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No. 80-1345

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

KAISER STEEL CORPORATION,
Petitioner,
v.
JULIUS MULLINS ET AL.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF FOR RESPONDENTS

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QUESTIONS PRESENTED

1. Whether, in a suit by trustees of an employee health and retirement trust fund to collect employer contributions to the fund required by a collective bargaining agreement, the courts below properly declined to entertain antitrust and unfair labor practice defenses to the agreement which were raised by the employer after all employee services had been performed?

2. Whether § 306(a) of the Multiemployer Pension Plan Amendments Act of 1980, enacted after the Court of Appeals rendered its judgment, requires affirmance of that judgment?

3. Whether the courts below properly held that the trustees of an employee health and retirement trust fund were entitled to reasonable attorneys' fees where they had recovered delinquent contributions from an employer-contributor in a suit brought pursuant to ERISA? *

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* Kaiser did not contest the Trustees' claim for attorneys' fees when the Trustees moved for summary judgment in the District Court. (J.A. 66.) Accordingly, while respondents brief the question, pp. 48-50, *infra*, we submit that it should not be considered. *Cf. Adickes* v. *S.H. Kress & Co.*, 398 U.S. 144, 147 n.2, 157 n.16 (1970).

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BRIEF FOR RESPONDENTS

STATUTES INVOLVED

In addition to the statutes in Appendix E to the petition, the following statutes are involved: §§ 502(g), 515, and 4402(e) of the Employee Retirement Income Security Act of 1974, as amended and added by the Multiemployer Pension Plan Amendments Act of 1980, 94 Stat. 1208, 29 U.S.C.A. §§ 1132(g), 1145, and 1461(e) (West Supp. 1976-80) (Appendix A, *infra*, p. 1a); and § 302 of the Labor-Management Relations Act, as amended, 29 U.S.C. § 186 (1976 & Supp. III, 1979) (Appendix B, *infra*, p. 4a).

STATEMENT OF THE CASE

This case is here on certiorari from a decision of the Court of Appeals affirming summary judgment for the Trustees of the United Mine Workers of America Health and Retirement Funds ("Trustees"). The Trustees brought the action to recover health and pension fund contributions from Kaiser Steel Corporation ("Kaiser"), one of the employers signatory to the National Bituminous Coal Wage Agreement of 1974 ("1974 Agreement") (J.A. 11). It is undisputed that Kaiser

—voluntarily agreed in the 1974 Agreement to make contributions to the Funds for each ton of coal it handled, whether acquired by production or purchase;

—accepted its employees' services during the term of the Agreement;

—filed reports with the Trustees, required by the Agreement, which failed to disclose the coal it purchased on which contributions were due; and then

—after the Agreement had expired and it had accepted all services due it, repudiated its promise and refused to pay the agreed contributions on purchased coal when asked to do so by the Trustees, claiming that its agreement to do so had been unlawful all along.[1]

[1] See Trustees' Statement of Material Facts (J.A. 69-73), to which Kaiser took no exception (Pet. Br. 2 n.2).

On these undisputed facts the District Court granted summary judgment for the Trustees, and the Court of Appeals affirmed. Both courts held that Kaiser's claim that it had entered into an unlawful agreement with the United Mine Workers of America ("UMW")—violating both the Sherman Act, 15 U.S.C. §§ 1, 2 (1976), and § 8(e) of the National Labor Relations Act ("NLRA"), 29 U.S.C. § 158(e) (1976)—is not a proper defense to this collection action by trustees of a multiemployer health and pension fund. Kaiser's underlying claim was that the Agreement was intended to aid the UMW in organizing non-UMW producers. The courts below held, however, that an employer should not be allowed to assert such a defense regarding union objectives, thereby transforming a simple collection suit by health and pension fund trustees into a complex antitrust and "hot cargo" case and forcing the trust funds to bear the great cost of litigating such an employer-union dispute.

Since the appeal was from a summary judgment, it is essential to distinguish, as Kaiser's brief does not, between the undisputed facts of record material to that judgment, and certain other hotly contested facts relating to Kaiser's cross motion for summary judgment on the merits of its antitrust and § 8(e) defenses,[2] which was denied and not appealed. (Pet. App. 68a.) These disputed facts are not material to the issue presented here—whether the courts below were correct in holding that these defenses should not be entertained on their merits. We set forth below the undisputed material facts.

A. The Facts

1. *The 1974 Coal Wage Agreement*

This case concerns Kaiser's obligations under the 1974 Agreement, a collective bargaining agreement between the UMW and various associations of coal operators, and certain independent coal operators. The Agreement was executed on December 6, 1974, and terminated December

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[2] See, *e.g.*, notes 3, 4, *infra*.

5, 1977. (J.A. 70.) Kaiser, a steel company engaged in mining, processing and purchasing coal, was a signatory to the 1974 Agreement. (J.A. 12, 58, 69, 70.)

Article XX of the 1974 Agreement provided for pension, health, and other benefits for covered employees, retired employees, and spouses and dependents of such employees, and established trusts from which these benefits were to be paid. (J.A. 26-37.) These trusts were established under and in compliance with § 302(c) of the Labor-Management Relations Act of 1947 ("LMRA"), as amended, 29 U.S.C. § 186(c) (J.A. 28), and are subject to the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1001 *et seq.* (J.A. 12). Article XX(d) of the Agreement governed the funding of these trusts. It required signatory employers to contribute to each trust specified amounts on all coal they handled, whether produced by such employers or purchased from others who had not made contributions. (J.A. 29-32, 70-71.)[3] The contribution to be paid on purchased coal, under what is known as the "purchase-of-coal" clause, was essentially equivalent to that due on produced coal. (C.A.J.A. 463-64, 570-71, 636-39.)[4] The

[3] The most important factual dispute between the parties on the merits of Kaiser's antitrust and § 8(e) defenses concerns the purpose of a clause in the 1974 Agreement requiring contributions on purchased coal. Kaiser's basic factual claim is that the clause was intended to cause UMW signatories who purchase coal to boycott non-UMW producers, so as to assist the UMW in organizing the latter. (Pet. Br. 3-4.) In opposition to Kaiser's cross motion for summary judgment, the Trustees presented affidavits showing that the clause requiring contributions on purchased coal was included in the 1974 Agreement to preserve the work and work standards of UMW employees and to assure the continuing viability of the Funds. (C.A.J.A. 568-70, 572-75, 629, 637-38.)

[4] In this respect the purchase-of-coal clause in the 1974 Agreement differed from previous national agreements, which had required employers to pay a *larger* contribution for purchased coal than for produced coal. The excess charged in the earlier agreements was sometimes referred to as a "penalty." (C.A.J.A. 570, 587-93.) Despite the "penalty" feature, the earlier clause was

1974 Agreement also required signatory employers to make monthly reports of coal produced and purchased and contributions due thereon. (J.A. 35.) The Agreement provided for negotiation of a replacement provision in the event the purchase-of-coal clause was challenged successfully. (J.A. 32.)

2. Kaiser's Coal Purchases and Reports to the Trustees

Throughout the term of the 1974 Agreement, Kaiser filed monthly reports ("remittance advice forms") of coal produced and the contributions due thereon. Kaiser failed to report that it had also purchased coal on which contributions had not been made.[5] Nor did Kaiser ever advise the Trustees that it refused to pay the amounts due under the purchase-of-coal clause or that it took the position that the clause was illegal. (J.A. 71-72; C.A.J.A. 630-34.)[6]

Prior to expiration of the 1974 Agreement, the Trustees received a report of Kaiser's purchases[7] and mounted an

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upheld by the NLRB. *UMW (Dixie Mining Co.)*, 188 NLRB 753 (1971). Nevertheless, to end objections to the clause, the parties to the 1974 Agreement eliminated "[w]hatever penalty may have been implicit in the disparity of payments in the earlier clause" (642 F.2d at 1306; Pet. App. 4a) by fixing contributions in a way that required substantially the same contribution whether the coal was produced or purchased.

[5] Copies of the remittance advice forms submitted by Kaiser are in the record. (C.A.J.A. 192-275.)

[6] In 1975, U.S. Steel Corporation, another signatory to the 1974 Agreement, brought an action against the UMW and the Trustees for a declaratory judgment that the purchase-of-coal clause violated § 8(e) and the Sherman Act. *U.S. Steel Corp.* v. *UMW*, C.A. No. 75-1966 (D.D.C.). The Trustees counterclaimed for the unpaid contributions. The District Court, without reaching the § 8(e) issue, determined that the clause did not violate the antitrust laws. (Order of Oct. 5, 1977.) The lawsuit was subsequently settled when U.S. Steel paid the full amount of the contributions owed. Kaiser did not join this suit, bring its own suit, or pay its contributions as a result of the outcome of the *U.S. Steel* suit. (C.A.J.A. 182.)

[7] The issue as to when the Trustees learned of Kaiser's purchases has been contested. The Trustees contend that they did not

investigation. The Trustees then demanded payment; when Kaiser refused, this suit was filed. (J.A. 72; C.A.J.A. 181-82.) Kaiser subsequently disclosed that the unpaid contributions called for by the purchase-of-coal clause in the 1974 Agreement were $1,557,865.[8]

B. Decisions Below

The District Court granted the Trustees' motion for summary judgment, holding that Kaiser's Sherman Act and § 8(e) defenses should not be entertained, and awarded attorneys' fees. (466 F. Supp. 911; Pet. App. 70a.) The Court of Appeals affirmed. It held that under the principles of *Lewis* v. *Benedict Coal Corp.*, 361 U.S. 459 (1960), Kaiser's illegality defenses should not be entertained in this suit by pension fund Trustees for delinquent contributions; that, under this Court's holding in *Kelly* v. *Kosuga*, 358 U.S. 516 (1959), since the contract had been fully performed by the employees, Kaiser could not avoid its obligation to pay the agreed-upon consideration by claiming that the Agreement violates the antitrust laws; and that Kaiser's § 8(e) defense fell within the NLRB's exclusive jurisdiction over unfair labor practices. The Court also affirmed the District Court's award of attorneys' fees pursuant to § 502(g) of ERISA. (642 F.2d 1302; Pet. App. 1a.)

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know anything of Kaiser's purchases until they received a report from a union member in June 1976. (C.A.J.A. 181.) Kaiser contends that the Trustees knew long before the commencement of the 1974 Agreement and nevertheless chose not to enforce the clause. (Pet. Br. 7.) Kaiser's contention is without adequate affidavit support to create a genuine issue of fact. It is based on the alleged knowledge of Anthony Boyle, whose tenure as a Trustee terminated prior to the 1974 Agreement and whose knowledge, therefore, could not be attributed to the Trustees under the 1974 Agreement (C.A.J.A. 468, 470). The Court of Appeals, however, assumed that for purposes of summary judgment Kaiser's view of this issue is to be taken as correct. As the Court further noted, though, the materiality of this fact is "marginal." (642 F.2d at 1307 n.3; Pet. App. 6a n.3.)

[8] Letter of Kaiser's counsel dated June 25, 1979, attached as Appendix A to Trustees' Brief in the Court of Appeals.

SUMMARY OF ARGUMENT

1. The Court of Appeals' refusal to entertain Kaiser's Sherman Act and § 8(e) defenses was a sound application of this Court's decision in *Lewis* v. *Benedict Coal Corp.*, 361 U.S. 459 (1960). *Benedict* rests on the principle that the contractual obligation of an employer to make contributions to employee trust funds should not be subject to ordinary defenses arising out of disputes between the employer and the union, because such contributions are a form of compensation to the employees and because the employees and their dependents should not be penalized for union misconduct over which they have little or no control. As several courts have reasoned, permitting an employer to defend failure to make contributions to employee trust funds required by a collective bargaining agreement—after all employee services under the agreement have been performed—on the ground that the agreement is unlawful, would unfairly penalize employees for union misdeeds and would transform a simple collection suit into a complex antitrust or labor law case. On the other hand, refusal to entertain such a defense has the constructive effect of forcing the employer to litigate its contention that the contract is illegal before employees render their services thereunder in reliance on the employer's promise of contributions. Moreover, rejection of Kaiser's illegality defenses poses no risk of circumvention of the antitrust or labor laws, for employers in its position have ample statutory remedies for violations of the Sherman Act and § 8(e) of the NLRA.

2. Apart from the principles of *Benedict*, the Court of Appeals' refusal to entertain Kaiser's Sherman Act defense was also a correct application of the settled standards for recognition of the defense of antitrust illegality in actions to recover the contract price for delivered goods or services. In *Kelly* v. *Kosuga*, 358 U.S. 516 (1959), this Court established that the defense of Sherman Act illegality should not be allowed in suits seeking the contract price for delivered goods or services unless

giving judgment on the contract would be enforcing the precise conduct made unlawful by the Act. The rule of *Kelly* is based on the dual principles that a party to a contract should not be permitted to reap the benefits of his bargain and subsequently disclaim his own obligation to perform and that the Sherman Act's express remedies should not be judicially supplemented with the arbitrary and capricious sanction of contract avoidance. Both principles are squarely applicable here. Moreover, this case does not fall within the narrow exception to the *Kelly* rule—where giving judgment for the plaintiff would be enforcing the precise conduct made unlawful by the Sherman Act—because Kaiser's antitrust defense is essentially a claim that the purchase-of-coal clause constitutes an unlawful boycott of non-UMW producers, and ordering the agreed-upon payments would not accomplish that boycott.

3. Apart from the principles of *Benedict*, the Court of Appeals also properly refused to entertain Kaiser's § 8(e) defense on the ground that it charges an unfair labor practice within the exclusive jurisdiction of the NLRB. Since this Court's decisions in *Garner* v. *Teamsters Local 776*, 346 U.S. 485 (1953), and *San Diego Building Trades Council* v. *Garmon*, 359 U.S. 236 (1959), it has been clear that Congress' commitment of authority for hearing and resolving unfair labor practice charges to the NLRB bars the state and federal courts from adjudicating such charges. The language and history of § 8(e) support application of the NLRB exclusive jurisdiction doctrine to preclude Kaiser's unfair labor practice defense. Although § 8(e) declares hot cargo agreements, whether "entered into heretofore or hereafter[,] . . . unenforcible and void," the context and history of that language make clear that its purpose was to make enforcement of hot cargo agreements, whenever executed, subject to the NLRB's exclusive unfair labor practice jurisdiction and to describe the status of agreements after the NLRB has determined them to be within the proscription of § 8(e). Finally, Kaiser's contention that

the Court of Appeals' construction of § 8(e) renders the national labor laws unconstitutional was neither raised before nor considered by the courts below and therefore should not be entertained by this Court. It is, in any event, meritless.

4. Nine days after the Court of Appeals rendered its decision in the case at bar, Congress enacted legislation —§ 306(a) of the Multiemployer Pension Plan Amendments Act of 1980, 94 Stat. 1295—that requires affirmance of the Court of Appeals' judgment. The purpose of § 306(a), as its language and legislative history make clear, is to ensure that trustees of multiemployer pension plans can collect delinquent contributions in accordance with the terms and conditions of the collective bargaining agreement, free of employer claims and defenses arising out of employer-union disputes over the legality of that agreement. The legislative history specifically indicates that § 306(a) is a statutory endorsement of the judicial decisions on which the Court of Appeals' judgment is based and a disapproval of decisions that have entertained employer defenses analogous to those Kaiser seeks to raise. The only illegality defense available to an employer under § 306(a) is that the payment would violate § 302 (a) of the LMRA, 29 U.S.C. § 186(a) (1976), which proscribes payments by an employer to a representative of his employees in the absence of a qualified trust, a defense not involved in the present case. Section 306(a) governs cases pending on the date of its enactment and hence requires affirmance of the Court of Appeals' judgment.

5. The award of attorneys' fees to the Trustees was statutorily authorized because this suit was properly brought under ERISA. Moreover, the Multiemployer Pension Plan Amendments Act of 1980 specifically authorizes attorneys' fees in cases such as this. Respondents submit, however, that the attorneys' fee issue should not be considered since Kaiser did not contest the Trustees' claim for attorneys' fees when the Trustees moved for summary judgment in the District Court.

ARGUMENT

I. THE COURT OF APPEALS' REFUSAL TO ENTERTAIN KAISER'S DEFENSE THAT THE PURCHASE-OF-COAL CLAUSE IS UNLAWFUL WAS A PROPER APPLICATION OF THE PRINCIPLES OF THIS COURT'S DECISION IN *LEWIS* v. *BENEDICT COAL CORPORATION*

The Trustees brought this suit to recover delinquent contributions due the Funds pursuant to the purchase-of-coal clause of Article XX(d) of the 1974 Agreement. Kaiser defended by asserting that the purchase-of-coal clause was an unlawful restraint of trade and a hot cargo clause which excused its failure to make the agreed contributions. Although Kaiser was free throughout the term of the 1974 Agreement to institute legal challenge to the clause, it chose not to do so and instead simply ignored its contractual obligations to report its purchases of coal and make the prescribed contributions thereon while accepting the services of its employees.[9]

Following *Lewis* v. *Benedict Coal Corp.*, 361 U.S. 459 (1960), and recognizing that overdue contributions to health and retirement trust funds are a form of compensation to the employees for services already rendered, the courts have been unreceptive to attempts by employers to defend their failure to make prescribed contributions on the ground that the agreement requiring them is unlawful. The Court of Appeals' refusal to entertain Kaiser's illegality defenses was a proper application of this principle and is consonant with national antitrust and labor policy.

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[9] As the Court of Appeals explained, the 1974 Agreement (J.A. 32) granted the UMW the "right to require the parties to meet and negotiate in good faith a replacement of the purchase-of-coal clause if the clause is adjudged to be invalid or unlawful." (642 F.2d at 1306 & n.2; Pet. App. 4a-5a & n.2.) By asserting the alleged illegality of the purchase-of-coal clause only after the 1974 Agreement had expired, Kaiser deprived the UMW of the right to bargain for a replacement provision for contributions to the Funds in the event the clause is adjudged unlawful. (642 F.2d at 1312-13; Pet. App. 17a-19a.)

A. *Benedict* Recognizes that Contractual Obligations of an Employer to Make Contributions to Employee Trust Funds Are Not Subject to Ordinary Contractual Defenses

In *Benedict*, a coal operator defended its failure to make prescribed contributions to an employee trust fund on the ground that its obligation was excused by the union's breaches of the agreement (by strikes and work stoppages). This Court ruled that the defense could not be asserted, that the union's performance of its promises was not a condition precedent to the operator's duty to make contributions to the fund (361 U.S. at 464-66), and that although an ordinary third-party beneficiary's rights may appropriately be subject to set-offs or defenses arising out of the promisee's (*i.e.*, the union's) breaches (*id.* at 467-68), special considerations applicable to a collective bargaining agreement requiring an employer to make payments to its employees' welfare and retirement fund precluded assertion of the set-off (*id.* at 468-71).

In particular, the Court regarded the employer's contributions to the fund as "really another form of compensation to the employees" and reasoned that "as such the obligation to pay royalty might be thought to be incorporated into the individual employment contracts." *Id.* at 469. The Court also examined the "impact of the national labor policy," noting that § 301(b) of the LMRA, 29 U.S.C. § 185(b), "evidences a congressional intention that the union as an entity, like a corporation, should in the absence of agreement be the sole source of recovery for injury inflicted by it." 361 U.S. at 470. "Although this policy was prompted by solicitude for the union members," the Court deemed it "to apply with even greater force to protecting the interests of beneficiaries of the welfare fund, many of whom may be retired, or may be dependents, and therefore without any direct voice in the conduct of union affairs." *Id.* Relying on these and related considerations, the Court held that the employer's asserted set-off based on the union's breaches was precluded. *Id.* at 470-71.

B. The Courts Have Repeatedly Refused to Entertain the Defense that a Collective Bargaining Agreement Requiring Contributions to Employee Trust Funds Is Illegal

Drawing on *Benedict*, courts have repeatedly dismissed arguments by employers that the purported illegality of collective bargaining agreements requiring contributions to employee health and retirement trust funds should excuse them, after the employee services have been performed, from making the prescribed contributions. Allowance of the illegality defense in this context, the courts have said, would penalize employees and their dependents for alleged union misdeeds over which they have little control and would often transform a simple collection action into a complex antitrust or unfair labor practice case; conversely, disallowance has the constructive effect of forcing the employer to litigate its contention that the contract is illegal before employees render their services thereunder in reliance on the employer's promise of contributions.

Thus, in *Huge* v. *Long's Hauling Co.*, 590 F.2d 457 (3d Cir. 1978), *cert. denied*, 442 U.S. 918 (1979), the Third Circuit refused to entertain the employer's defense that it need not make contributions to the UMW Health and Retirement Funds because the 1974 Agreement providing for such contributions was unlawful under the Sherman Act. The employer, a hauler of coal, claimed that it had signed the 1974 Agreement due to union pressure enforcing an unlawful restraint of trade (a clause in the Agreement prohibiting signatory employers from contracting the handling of coal to non-signatory haulers), which pressure vitiated the entire contract, including the obligation to contribute to the Funds. 590 F.2d at 458-60 (opinion of Seitz, C. J.); *id.* at 461-62 (Adams, J., concurring); *id.* at 466-67 (Rosenn, J., dissenting). Relying on *Benedict*, Chief Judge Seitz refused to consider the employer's antitrust defense with respect to overdue obligations because "such payments 'have the characteristics of compensation to the employees

for services they have already rendered.'" *Id.* at 459 (quoting *Lewis* v. *Seanor Coal Co.*, 382 F.2d 437, 441 (3d Cir. 1967), *cert. denied*, 390 U.S. 947 (1968)).

Judge Adams, concurring, held with respect to both retrospective and prospective relief[10] "that where the trustees of a union welfare or pension fund sue to compel an employer to make contributions as stipulated in the labor contract between the employer and the union, the employer may not assert *any* defenses that he may arguably have to that contract." *Id.* at 463. He reasoned that insulation of the employer's obligation to contribute from employer defenses to the labor contract serves "vital public interests," including protection of the expectations of the employees regarding their compensation, and avoidance of the unfairness of penalizing employees, retirees, and dependents for alleged union misconduct over which they have little control.[11] *Id.* at 464-65. Judge Adams also noted the desirability, "as a matter of judicial administration," of requiring the employer to sue the

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[10] Unlike the present case, the Trustees in *Long's Hauling* also sought to "compel future payment of royalties as yet unearned." 590 F.2d at 459.

[11] Numerous courts have applied these principles in refusing to consider employer defenses based on union conduct in suits to recover delinquent contributions to employee health and retirement trust funds. *E.g.*, *Pennington* v. *UMW*, 325 F.2d 804, 818-19 (6th Cir. 1963), *cert. denied*, 381 U.S. 949 (1965) (refusing to entertain employer's claim that labor contract was illegal); *Boyle* v. *North Atl. Coal Corp.*, 331 F. Supp. 1107 (W.D. Pa. 1971) (refusing to entertain employer's claim that oral understanding with union relieved it of royalty obligation); *Lewis* v. *Seanor Coal Co.*, 256 F. Supp. 456 (W.D. Pa. 1966), *aff'd*, 382 F.2d 437 (3d Cir. 1967), *cert. denied*, 390 U.S. 947 (1968) (refusing to entertain employer's claims of illegality of agreement and estoppel based on oral representations of union); *Lewis* v. *Harcliff Coal Co.*, 237 F. Supp. 6 (W.D. Pa. 1965) (refusing to entertain employer's claim that union fraud and other misdeeds surrounded execution of agreement); *Goldies, Inc.* v. *Alaska Hotel Employees Fund*, 622 P.2d 979, 981 & n.7 (Alas. 1981) ("invalidity or illegality of a collective bargaining agreement does not alter the employer's duty to make employee benefit contributions").

union directly if it believes it is excused from performance of part or all of the collective bargaining agreement by the union's alleged violations of law. *Id.* at 465.

Similarly, in *Trustees, Local 387 Pension Fund* v. *Southern Stress Wire Corp.*, 509 F. Supp. 1097 (N.D. Ga. 1981), the court refused to allow an employer to interpose, in a suit to recover delinquent contributions to a pension fund, the defense that the agreement requiring such payments is legally unenforceable. The agreement at issue was a prehire agreement authorized by § 8(f) of the NLRA, 29 U.S.C. § 158(f), which, as this Court held in *NLRB* v. *Local 103, Int'l Ass'n of Bridge Workers* (*Higdon*), 434 U.S. 335, 344-52 (1978), is unenforceable by the union absent a showing that it represents a majority of the employees in the relevant bargaining unit. Nevertheless, the court in *Southern Stress Wire*, relying on this Court's decision in *Benedict*, ruled that the union's lack of majority status is not a defense to a suit to recover delinquent contributions to a pension fund required by the terms of a prehire agreement, since such contributions are in reality compensation for services already rendered by the employees. 509 F. Supp. at 1103-04.[12]

The Court of Appeals' refusal to entertain Kaiser's illegality defenses was thus a straightforward application of the principle that emerges from *Benedict* and its progeny: employers should not be allowed to repudiate their promises to make contributions to employee trust funds, where the employer's quarrel is with the union, not the bene-

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[12] Some courts have held that *Higdon* bars suits to recover delinquent contributions to employee benefit funds called for by a prehire agreement absent proof that the union represents a majority of the unit's employees. *E.g., Washington Carpenters' Welfare Fund* v. *Overhead Door Co.*, 488 F. Supp. 816 (D.D.C. 1980), *appeal pending*, (D.C. Cir. No. 80-1501); *Western Washington Trust Fund* v. *McDowell*, 103 LRRM 2219 (W.D. Wash. 1979), *appeal pending*, (9th Cir. No. 80-3024). As explained below, Congress expressly disapproved these decisions in enacting § 306(a) of the Multiemployer Pension Plan Amendments Act of 1980, 94 Stat. 1295. See pp. 43-44, *infra*.

ficiaries of the trust fund, and where the employees have already performed their services pursuant to the agreement.

C. The Court of Appeals' Decision Is Consistent with National Antitrust and Labor Policy

Kaiser suggests that if the Court of Appeals' application of the principles of *Benedict* to deny recognition of its illegality defenses is correct, then "parties would be able to circumvent the antitrust and labor laws simply by casting illegal restraints in the form of clauses that require penalty payments to [pension] funds." (Pet. Br. 31.) Kaiser's concern is unfounded, for it ignores the adequate legal remedies available to employers in its position.

For as long as permitted by the applicable statute of limitations, Kaiser has been free to file an antitrust action against the UMW, the other party to the agreement, challenging the purchase-of-coal clause as an unlawful boycott. If as of the date of such a suit Kaiser had sustained an injury in its "business or property" within the meaning of § 4 of the Clayton Act, 15 U.S.C. § 15, traceable to the clause, it could seek treble damages. Otherwise, Kaiser could seek a declaratory judgment that the clause violates the antitrust laws, as did U.S. Steel, another signatory employer. See note 6, *supra*. Although Kaiser's antitrust dispute is with the UMW, it could properly join the Trustees as party-defendants in an antitrust suit against the Union and seek prospective relief from the obligation to contribute to the Funds.[13] Similarly, for as long as permitted by the applicable statute of limitations,[14] Kaiser has been entitled to file an unfair labor practice charge with the NLRB, assailing the

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[13] *Benedict* and its progeny make clear that Kaiser's only recourse regarding delinquent contributions for which employee services have already been performed is against the UMW, not the Funds.

[14] See generally *Bricklayers Union* v. *NLRB*, 562 F.2d 775, 781-83 (D.C. Cir. 1977).

purchase-of-coal clause as a hot cargo provision violative of § 8(e).

Accordingly, disallowance of Kaiser's illegality defenses opens no gap in enforcement of the antitrust or labor laws. The Court of Appeals' decision does not trench on the ample remedies Congress has prescribed for violations of the Sherman Act and § 8(e).

II. THE COURT OF APPEALS' REJECTION OF KAISER'S ANTITRUST DEFENSE WAS A CORRECT APPLICATION OF *KELLY* v. *KOSUGA*

Apart from the principles of *Benedict*, Kaiser's antitrust defense is also precluded by settled standards for entertaining such defenses in actions to recover the contract price for delivered goods or services. These standards were most recently articulated by this Court in *Kelly* v. *Kosuga*, 358 U.S. 516 (1959), and were properly applied by the Court of Appeals. (642 F.2d at 1309-10; Pet. App. 10a-15a.)

A. *Kelly* Establishes that the Defense of Antitrust Illegality Should Not be Entertained in a Suit to Recover the Contract Price for Delivered Goods or Services

In *Kelly*, this Court restated and clarified the standards for entertaining the defense of Sherman Act illegality in actions to recover the contract price for delivered goods or services. Kosuga and an associate, owners of large amounts of onions, informed Kelly and other onion growers that unless the growers purchased a large portion of these onions, they would deliver them on the futures exchange and depress the price. 358 U.S. at 517. Kelly and the other growers, fearful of the economic loss they would suffer were the onion market flooded, agreed to purchase 287 carloads of onions, in exchange for the promise of Kosuga and his associate that they would not deliver any onions on the futures market for the balance of the current trading season. The purpose of this agreement was admittedly to stabilize the price of onions. *Id.*

Kelly refused to accept delivery of 37 carloads; the onions deteriorated; and Kosuga brought suit to recover the contract price. Kelly "interposed the defense that the sale was made pursuant to and as an indivisible part of an agreement which violated § 1 of the Sherman Anti-trust Act . . . ." *Id.* at 516. The district court struck the defense, the court of appeals affirmed, and this Court granted certiorari to consider whether the defense of Sherman Act illegality should be allowed when the plaintiff is "seeking to invoke the aid of the Federal District Court to enforce the very agreement which constituted, in itself, a violation of the Sherman Anti-Trust Act of 1890." Petition for Writ of Certiorari at 3, *Kelly* v. *Kosuga.*

This Court affirmed, stating:

> "As a defense to an action based on contract, the plea of illegality based on violation of the Sherman Act has not met with much favor in this Court. This has been notably the case where the plea has been made by a purchaser in an action to recover from him the agreed price of goods sold." *Id.* at 518 (footnote omitted).

The Court succinctly stated the governing rule and its dual rationale: [15]

> "Past the point where the judgment of the Court would itself be enforcing the precise conduct made unlawful by the [Sherman] Act, the courts are to be guided by the overriding general policy, as Mr. Justice Holmes put it, 'of preventing people from getting other people's property for nothing when they purport to be buying it.' *Continental Wall Paper Co.* v. *Louis Voight & Sons Co.*, [212 U.S. 227] at 271 (dissenting opinion). Supplying a sanction

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[15] The essence of the rule of *Kelly* was foreshadowed by the Court's ruling in *Bruce's Juices, Inc.* v. *American Can Co.*, 330 U.S. 743, 755 (1947) (antitrust defense should be entertained only where the contract "has as its object and effect accomplishment of illegal ends which would be consummated by the judgment sought. . . .").

> for the violation of the Act, not in terms provided and capricious in its operation, . . . is avoided by treating the defense as so confined." *Id.* at 520-21 (citation omitted).

Because it could not "be said to enforce a violation of the Act to give legal effect to a completed sale of onions at a fair price," Kelly's Sherman Act defense was deemed properly stricken. *Id.* at 521.

Kaiser argues that *Kelly* "applied the long-settled rule that a lawful contract provision—the sale agreement at issue in that case—may be enforced, so long as it is severable from the illegal portion of the contract[;] [b]ut it left intact . . . the corollary rule that a court will not enforce an illegal contract provision." (Pet. Br. 13.) Kaiser's contention simply restates the precise argument raised by the petitioner in *Kelly* and rejected by the Court. Brief for Petitioner at 7, *Kelly* v. *Kosuga*. This Court accepted the petitioner's allegation that the promise to pay for the onions was "an indivisible part of an agreement which violated § 1 of the Sherman Antitrust Act." 358 U.S. at 516. But it rejected the relevance of this characterization, holding that "analysis in terms of 'divisibility' or some other verbal formula may well be circular" (*id.* at 521), and that unless giving judgment on the contract would "itself be enforcing the precise conduct made unlawful by the Act" (*id.* at 520), the defense that the contract is unlawful under the Sherman Act should not be recognized.[16]

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[16] After noting the fallacy of analysis in terms of divisibility, the Court added that "in any event, where, as here, a lawful sale for a fair consideration constitutes an intelligible economic transaction in itself, we do not think it inappropriate or violative of the intent of the parties to give it effect even though it furnished the occasion for a restrictive agreement of the sort here in question." 358 U.S. at 521. Like the purchase of onions, Kaiser's agreement to make contributions to the Funds, measured in part by the tons of coal purchased, constituted an "intelligible economic transaction in itself." *Cf. Walsh* v. *Schlecht*, 429 U.S. 401 (1977) (enforcing a clause in a collective bargaining agreement requiring an employer

Thus, the rule of *Kelly* is that where a contract has been performed by one side, the non-performing party may not avoid his obligations by arguing that the contract was entered into in violation of the antitrust laws, so long as giving judgment on the contract would not involve the court in enforcing or requiring the very conduct proscribed by the antitrust laws.[17] None of the cases

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to make payments to its employee benefit fund based on hours of work performed by non-union employees of a non-signatory subcontractor).

[17] Kaiser makes the extravagant claim that "until this case no court had ever enforced an illegal contract clause." (Pet. Br. 19.) In fact, the rule of *Kelly* has been followed consistently whenever, after one party to a contract has already performed, the other party tries to avoid his obligations by arguing that the contract was unlawful under the antitrust laws. See, *e.g.*, *Arkla Air Conditioning Co.* v. *Famous Supply Co.*, 551 F.2d 125, 126-27 (6th Cir. 1977) (per curiam) (refusing to consider defense that exclusive distributorship clause violates Sherman Act in suit for damages for breach of that clause); *Viacom Int'l, Inc.* v. *Tandem Prod., Inc.*, 526 F.2d 593, 598-600 (2d Cir. 1975) (rejecting antitrust defense, not on ground that contract at issue was severable from allegedly illegal tying arrangement, but rather because recognition of defense might unjustly enrich defendant and would transform a simple contract suit into a complex antitrust case); *El Salto, S.A.* v. *PSG Co.*, 444 F.2d 477, 481-83 (9th Cir.), *cert. denied*, 404 U.S. 940 (1971) (although the alleged antitrust violation is inherent in the very contract sued upon, such a violation is not a defense to an action for the contract price for delivered coffee); *Sunshine Packers, Inc.* v. *American Can Co.*, 395 F.2d 86, 87-88 (5th Cir. 1968) (although loan may have violated antitrust decree, that constitutes no defense to an action on the note evidencing the loan); *Pennington* v. *UMW*, 325 F.2d 804, 818-19 (6th Cir. 1963), *cert. denied*, 381 U.S. 949 (1965) (even if trustees of benefit fund had engaged in conspiracy to drive small coal operators out of business by, *inter alia*, imposition of contract requiring employer contributions, that constitutes no "bar to the right of the Trustees to collect the royalty payments which had accrued under the contract on the coal already mined"); *Mullins* v. *Reitz Coal Co.*, 105 LRRM 2776, 2778-79 (D.D.C. 1979) (enforcing claim for delinquent contributions pursuant to purchase-of-coal clause despite defense that clause violates Sherman Act).

cited by Kaiser is inconsistent with this interpretation of *Kelly*.[18]

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[18] Kaiser seeks to rewrite this Court's opinion in *Kelly*, suggesting that this Court's formulation of the narrow circumstances when an illegality defense founded on the Sherman Act will be entertained in a suit to recover the contract price for delivered goods or services—"where the judgment of the Court would itself be enforcing the precise conduct made unlawful by the Act"—be revised to mean "enforcing the particular illegal contractual promise." (Pet. Br. 18 n.18) According to Kaiser, courts have uniformly refused to enforce illegal contract clauses, "[r]egardless whether their orders would bring about conduct that is itself illegal. . . ." (Pet. Br. 19.) This is incorrect. See note 17, *supra*. In support of this statement, Kaiser discusses or cites *Barrows* v. *Jackson*, 346 U.S. 249 (1953); *Weil* v. *Neary*, 278 U.S. 160 (1929); *McMullen* v. *Hoffman*, 174 U.S. 639 (1899); *Carpa, Inc.* v. *Ward Foods, Inc.*, 536 F.2d 39 (5th Cir. 1976); *Farbenfabriken Bayer, A.G.* v. *Sterling Drug, Inc.*, 307 F.2d 207 (3d Cir. 1962), *cert. denied*, 372 U.S. 929 (1963); *Kogod* v. *Stanley Co.*, 186 F.2d 763 (D.C. Cir. 1950); *Eiberger* v. *Sony Corp.*, 459 F. Supp. 1276 (S.D.N.Y. 1978), *aff'd in part and rev'd in part*, 622 F.2d 1068 (2d Cir. 1980); *Premier Elec. Constr. Co.* v. *Miller-Davis Co.*, 291 F. Supp. 295 (N.D. Ill. 1968), *aff'd*, 422 F.2d 1132 (7th Cir.), *cert. denied*, 400 U.S. 828 (1970); *United States* v. *Bayer Co.*, 135 F. Supp. 65 (S.D.N.Y. 1955); *Revlon, Inc.* v. *Williams Int'l, Inc.*, 30 Misc. 2d 772, 214 (N.Y.S. 2d 456 (Sup. Ct. 1961). (Pet. Br. 19-22.) None is apposite.

In *Revlon* and *Carpa*, the courts clearly distinguished between enforcement of an illegal contract requiring future conduct and one for goods or services already delivered, and indicated that the illegality defense was allowable only in the former circumstances. *Carpa*, 536 F.2d at 54-55 & n.6; *Revlon*, 214 N.Y.S. 2d at 460. In *Kogod* and *Eiberger*, the party raising the defense of illegality had not been unjustly enriched. In *Kogod*, the plaintiff was a third-party beneficiary of the contract on which he sued who had not delivered any goods or performed any services for which he was entitled to be paid. 186 F.2d at 764-65. In *Eiberger*, the court stressed that the plaintiff was seeking to recover an "unearned" service fee. 459 F. Supp. at 1289.

Both *Bayer* cases and *Premier Electrical* involved agreements where the consideration offered by the party seeking enforcement of the contract was itself illegal. 307 F.2d at 208-10; 135 F. Supp. at 68-73; 291 F. Supp. at 302-03. In other words, in these cases, as with the "hired murderer" hypothetical proposed by Kaiser (Pet.

B. The Rationale of *Kelly* Applies Here

The rationale of *Kelly* is twofold. First, people should not be able to get "other people's property for nothing when they purport to be buying it." 358 U.S. at 520-21 (quoting *Continental Wall Paper Co.* v. *Louis Voight & Sons Co.*, 212 U.S. 227, 271 (1909) (Holmes, J., dissenting)). In other words, a party to a contract should not be permitted to reap the benefits of his bargain and subsequently disclaim his own obligation to perform. Second, the "Sherman Act's express remedies [should] not be added to judicially by including the avoidance of private contracts as a sanction." 358 U.S. at 519 (citing *D. R. Wilder Mfg. Co.* v. *Corn Prod. Ref. Co.*, 236 U.S. 165, 174-75 (1915)). See also *Hawaii* v. *Standard Oil Co.*, 405 U.S. 251, 262 (1972).[19]

Br. 18-19), one party to the contract performed some agreed-upon unlawful conduct (*e.g.*, price fixing, murder) and then sought the aid of the court in securing payment for the illegal services rendered. Here, on the other hand, the consideration received by Kaiser was the lawful performance by its employees of the service obligations prescribed by the collective bargaining agreement. *Weil* involved an attempt by an attorney for creditors to enforce a fee-sharing agreement with an attorney for trustees in bankruptcy. The consideration offered by the party seeking enforcement—supervision of the attorney for the trustees in bankruptcy—was itself unlawful. Additionally, there was no claim that nonenforcement of this agreement would result in unjust enrichment and no contention that Congress had provided exclusive remedies for such violations. Similarly, in *McMullen*, the services (bid rigging) performed by the party seeking an accounting were unlawful. 174 U.S. at 645-46. Beyond that, the Court emphasized that the contract involved fraud and dishonesty. *Id.* at 649, 669. Moreover, *McMullen* did not involve the defense of antitrust illegality, and thus did not require the Court to assess the appropriateness of adding to the statutory remedies Congress has provided.

Barrows held that a racial restrictive covenant could not be enforced in a suit for damages, since to do so would deprive non-Caucasians of equal protection. 346 U.S. at 254. No question of unjust enrichment, or of adding to congressionally prescribed remedies for a statutory violation, was presented.

[19] The legislative history of the federal antitrust statutes reveals that Congress repeatedly rejected bills that would have authorized

Both reasons fully apply to this case. Kaiser concedes that the purchase-of-coal clause is "part of the total consideration [promised] by Kaiser Steel" in exchange for the services of its employees over the three-year term of the Agreement. (Pet. Br. 28 n.52.) Kaiser received those services, reaped the benefits for which it had bargained, and now seeks to avoid its reciprocal obligation. To allow Kaiser to escape paying the compensation owed to its employees would result in an unjust windfall to Kaiser.

Recognition of Kaiser's antitrust defense would also be inconsistent with this Court's admonition that the statutory remedies for violation of the antitrust laws should not be judicially supplemented with the "avoidance of private contracts as a sanction." Kaiser has long been at liberty to file an antitrust action seeking relief with respect to the purchase-of-coal clause and the congressionally prescribed remedies have been fully adequate to protect it against antitrust injury.[20]

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violations of the antitrust laws to be asserted as a defense in contract actions. Seven of the bills introduced in the same month as the Sherman Act contained provisions to that effect. "Bills Relating to Trusts" S. Doc. No. 147, 57th Cong., 2d Sess. (1903). None of these provisions was even brought to a vote. When the Clayton Act was adopted, Congress rejected proposals by Senator LaFollette which would have authorized such a defense. S. 191, S. 2552, 63d Cong., 1st Sess. (1913). By contrast, several state antitrust laws enacted in the same period provided that the purchaser from a violater could prove the violation as a complete defense to an action for the contract price. See Lockhart, *Violation of the Anti-trust Laws as a Defense in Civil Actions*, 31 Minn. L. Rev. 507, 508-09 (1947).

[20] Kaiser argues that the availability of statutory antitrust remedies does not preclude its illegality defense, relying on *Bement* v. *National Harrow Co.*, 186 U.S. 70 (1902). (Pet. Br. 23-24.) *Bement*, a case between a patentee and a licensee of the patent decided at the dawn of the antitrust era, states that "any one sued upon a contract may set up as a defence that it is a violation of the [Sherman Act], and if found to be so, that fact will constitute a good defence to the action." 186 U.S. at 88. This statement did not survive this Court's holdings in *Bruce's Juices, Inc.*, v. *Amer-*

C. Ordering Kaiser to Make Prescribed Contributions to the Funds Is Not Enforcing the Precise Conduct Made Unlawful by the Sherman Act

Kaiser argues that this case comes within the narrow exception to the *Kelly* rule—that ordering it to make promised payments to the Funds would be enforcing the precise conduct made unlawful by the Sherman Act. (Pet. Br. 16-18.) However, Kaiser's antitrust defense is essentially a claim that the purchase-of-coal clause constitutes an unlawful boycott of non-UMW coal producers (*id.* 3-5), and ordering the agreed-upon payments would not accomplish that boycott. As the District Court said: "The contract is at an end—decisions to purchase or not to purchase have been made and acted upon." (466 F. Supp. at 915; Pet. App. 77a.) Enforcement of Kaiser's obligation under the 1974 Agreement will not undo or affect those decisions.

Kaiser and amicus Pennsylvania Coal Mining Association ("PCMA") suggest that ordering Kaiser to make the prescribed payments will cause future boycotts of non-UMW producers because the 1978 and 1981 UMW collective bargaining agreements also contain purchase-of-coal clauses. (Pet. Br. 16-18 & n.23; Brief of PCMA 2-7.) Those separate contracts are not at issue here. The 1978 Agreement has expired and to the extent that enforcement of the 1974 Agreement may influence present or prospective purchasing decisions under the current 1981 Agreement, Kaiser, other signatory employers, and non-UMW producers all have ample remedies available to them under the antitrust laws, including suits for declaratory relief and treble damages. "[T]he Sherman Act's express remedies [should] not be added to ju-

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ican Can Co., 330 U.S. 743 (1947), see *id.* at 761 (Murphy, J., dissenting, relying on *Bement*), and *Kelly* v. *Kosuga*, 358 U.S. at 520-21 (narrowing the Court's holding in *Continental Wall Paper Co.* v. *Louis Voight & Sons Co.*, 212 U.S. 227 (1909) and endorsing Justice Holmes' dissent, a case where the majority relied on the broad language in *Bement*, *id.* at 265).

dicially by including the avoidance of private contracts as a sanction." *Kelly* v. *Kosuga*, 358 U.S. at 519.

Kaiser also argues that ordering it to make the prescribed payments would subject it "to an injury—payment of an unlawful penalty—that the antitrust laws are intended to prevent." (Pet. Br. 17.) Kaiser's assertion of injury, as the Court of Appeals recognized, does not bring its defense within the exception to the *Kelly* rule. (642 F.2d at 1310; Pet. App. 13a.)[21] The *Kelly* exception is limited to court action enforcing the precise conduct made unlawful by the antitrust laws. Kaiser's formulation of the exception would swallow the *Kelly* rule.[22]

In short, requiring Kaiser to make payments to the Funds is not enforcing the precise conduct—the boycott—made unlawful by the Sherman Act. Allowing Kaiser's Sherman Act defense would, in direct conflict with *Kelly*, permit Kaiser to appropriate the services of its employees without paying the agreed compensation.

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[21] See also *Huge* v. *Long's Hauling Co.*, 590 F.2d 457, 460 (3d Cir. 1978), *cert. denied*, 442 U.S. 918 (1979).

[22] *Kelly* and *Bruce's Juices*, this Court's two most recent decisions on the subject, are illustrative of the narrowness of the exception to the *Kelly* rule. In *Bruce's Juices, Inc.* v. *American Can Co.*, 330 U.S. 743 (1947), the defendant argued that giving judgment on notes representing the purchase price of goods sold and delivered had the effect of enforcing an allegedly illegal component of the price—the difference between the price charged the defendant buyer and the lower prices charged to competitors. The Court rejected this contention, reasoning that all the "plaintiff must show is the notes which import consideration" and requiring payment of those notes would not involve the Court in enforcing an unlawful price discrimination. *Id.* at 756. In *Kelly*, the defendant argued that a judgment for the plaintiff requiring payment of the purchase price would be enforcing an agreement to fix prices since the object of the defendant's promise to purchase onions and the plaintiff's reciprocal promise not to deliver onions on the futures market was price stabilization. The Court dismissed this contention, saying "it can hardly be said to enforce a violation of the Act to give legal effect to a completed sale of onions . . . ." 358 U.S. at 521.

III. THE COURT OF APPEALS CORRECTLY HELD THAT KAISER'S UNFAIR LABOR PRACTICE DEFENSE IS WITHIN THE LABOR BOARD'S EXCLUSIVE JURISDICTION

In addition to its antitrust defense, Kaiser resisted the Trustees' claim for delinquent contributions on the ground that the purchase-of-coal clause violates § 8(e) of the NLRA, 29 U.S.C. § 158(e) (1976). Apart from being foreclosed by the principles of *Benedict*, this defense was properly rejected by the Court of Appeals on the ground that it charges an unfair labor practice within the exclusive jurisdiction of the NLRB. (642 F.2d at 1313-18; Pet. App. 19a-30a.)

The Court of Appeals' ruling is a correct application of the exclusive jurisdiction doctrine articulated by this Court in *Garner* v. *Teamsters Local 776*, 346 U.S. 485 (1953), and *San Diego Bldg. Trades Council* v. *Garmon*, 359 U.S. 236 (1959). Contrary to Kaiser's claim, nothing in the language or legislative history of § 8(e) indicates that Congress intended to create a unique unfair labor practice that would be adjudicated by the courts instead of the NLRB. Kaiser's argument that judicial determination of its unfair labor practice defense is justified under the rationales of *Connell Constr. Co.* v. *Plumbers Local 100*, 421 U.S. 616 (1975), and *Local 174, Teamsters* v. *Lucas Flour Co.*, 369 U.S. 95 (1962), is also unfounded. Finally, Kaiser's meritless claim that § 8(e), if construed consistently with the doctrine of exclusive NLRB jurisdiction, renders the national labor laws unconstitutional, should not be considered by this Court since it was neither raised before nor considered by the District Court or the Court of Appeals.

A. The NLRB Exclusive Jurisdiction Doctrine Is Squarely Applicable

Kaiser's § 8(e) defense is squarely within the NLRB's exclusive unfair labor practice jurisdiction, as recognized by the decisions of this Court.

This Court's first major decision on judicial authority to remedy activity prohibited by § 8 of the NLRA was *Garner* v. *Teamsters Local 776, supra.* A Teamsters local engaged in picketing of trucking companies whose employees were not members of the union, allegedly to coerce these companies "into compelling or influencing their employees to join the union." *Id.* at 487. If the companies' allegations were true, then the union's conduct violated both the Pennsylvania Labor Relations Act and § 8(b)(2) of the NLRA. This Court ruled that the Pennsylvania courts lacked power to enjoin the picketing because the NLRB has exclusive jurisdiction to adjudicate and remedy conduct that violates § 8:

> "Congress did not merely lay down a substantive rule of law to be enforced by any tribunal competent to apply law generally to the parties. It went on to confide primary interpretation and application of its rules to a specific and specially constituted tribunal and prescribed a particular procedure for investigation, complaint and notice, and hearing and decision, including judicial relief pending a final administrative order. Congress evidently considered that centralized administration of specially designed procedures was necessary to obtain uniform application of its substantive rules and to avoid these diversities and conflicts likely to result from a variety of local procedures and attitudes toward labor controversies. . . . A multiplicity of tribunals and a diversity of procedures are quite as apt to produce incompatible or conflicting adjudications as are different rules of substantive law. The same reasoning which prohibits federal courts from intervening in such cases, except by way of review or on application of the federal Board, precludes state courts from doing so." *Id.* at 490-91.

Thus, the Court recognized that Congress' commitment of authority for hearing and resolving unfair labor practice charges to a specialized, expert tribunal bars the state and federal courts from adjudicating such charges.

The Court's classic statement of the NLRB exclusive jurisdiction doctrine was articulated in *San Diego Bldg. Trades Council* v. *Garmon*, 359 U.S. 236 (1959): "When an activity is arguably subject to § 7 or § 8 of the Act, the States as well as the federal courts must defer to the exclusive competence of the National Labor Relations Board if the danger of . . . interference with national policy is to be averted." *Id.* at 245. Uniform development of the national labor policy ordained by Congress, the Court reasoned, requires that the Board and not the courts determine whether disputed activity is protected by § 7, prohibited by § 8, or unregulated by the Act. *Id.* at 244-46. In short, the Board has exclusive jurisdiction to determine whether an unfair labor practice has been committed and to remedy practices found to be unfair under § 8.

Kaiser argues that the exclusive jurisdiction doctrine is inapplicable because its unfair labor practice claim is being raised defensively, and not in a suit for affirmative relief. (Pet. Br. 32-35.) The proposed distinction is untenable and finds no support in the cases or in the doctrinal foundations of the NLRB exclusive jurisdiction principle. The risks to uniform and expert development of national labor policy are not lessened when it is at the instance of the defendant, rather than the plaintiff, that courts decide, independently of the Board, whether conduct is protected by § 7 or unfair under § 8.[23]

This Court has refined the *Garmon* doctrine so as to permit, under some circumstances, a party with no method

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[23] See cases cited in note 25, *infra*. None of the cases discussed or cited by Kaiser in advancing its proposed distinction between remedies and defenses (Pet. Br. 32-35) involved resolution of questions (such as an unfair labor practice claim) that Congress has exclusively committed for decision to an expert administrative tribunal. *E.g.*, *Transamerica Mortgage Advisors, Inc.* v. *Lewis*, 444 U.S. 11 (1979) (determining whether § 206 and § 215 of the Investment Advisers Act of 1940 create a private cause of action for damages); *Vendo Co.* v. *Lektro-Vend Corp.*, 433 U.S. 623, 635-36 n.6 (1977) (plurality opinion) (noting that state courts have jurisdiction over federal antitrust defenses).

of invoking the jurisdiction of the Board to obtain judicial regulation of conduct arguably prohibited by § 8. *Sears, Roebuck & Co.* v. *Carpenters*, 436 U.S. 180, 197 (1978). However, this Court has never wavered from the principle that where the controversy presented to the court involves arguably prohibited conduct and that controversy is "identical to . . . that which could have been, but was not, presented to the Labor Board," the "risk of interference with the unfair labor practice jurisdiction of the Board" requires the court to abstain from independently resolving the dispute. *Id.*

Kaiser's § 8(e) defense is a claim that the union committed an unfair labor practice by entering into a hot cargo agreement and that consequently that agreement is unenforceable. This is a complex factual and legal question squarely within the Board's unfair labor practice jurisdiction. Kaiser could have presented this precise controversy to the Board by filing an unfair labor practice charge, but chose not to do so.[24] Instead, Kaiser sought to have the courts determine, independently of the Board, the lawfulness of the purchase-of-coal clause under § 8(e), a course that would thwart Congress' intent to entrust the NLRB with responsibility for shaping and applying a uniform interpretation of the national labor laws.[25]

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[24] Perhaps Kaiser chose this course because it doubted that the Board would find the charge meritorious, since a predecessor clause has been upheld by the Board and a successor clause in the 1978 Agreement has been found lawful by the General Counsel. *UMW (Dixie Mining Co.)*, 188 NLRB 753 (1971); *UMW (Consolidated Coal Co.)*, Case No. 6-CE-17 (1979).

[25] The lower courts have repeatedly applied the exclusive jurisdiction doctrine to hold that the federal courts may not decide, independently of the Board, the merits of a § 8(e) defense in a suit for enforcement of a collective bargaining agreement. *Waggoner* v. *Northwest Excavating, Inc.*, 642 F.2d 333, 338 n.2 (9th Cir. 1981); *Orange Belt Painters No. 48* v. *Maloney Specialties, Inc.*, 639 F.2d 487, 491 (9th Cir. 1980); *Waggoner* v. *R. McGray, Inc.*, 607 F.2d 1229, 1235 (9th Cir. 1979); *Huge* v. *Long's Hauling Co.*, 590 F.2d 457, 461 (3d Cir. 1978), *cert. denied*, 442 U.S. 918 (1979); *Mul-*

B. The Language and History of § 8(e) Support Application of the NLRB Exclusive Jurisdiction Doctrine

As Kaiser recognizes, the language of § 8(e) provides that "[i]t shall be an unfair labor practice" to enter into a hot cargo agreement. Kaiser contends, however, that the additional statutory language providing that "any contract or agreement entered into heretofore or hereafter containing such an [illegal hot cargo clause] shall be to such extent unenforcible and void" results in the creation of a unique, unfair labor practice that the courts as well as the NLRB have the power to adjudicate. (Pet. Br. 35.) Thus, Kaiser argues that even if the exclusive jurisdiction doctrine would apply and bar Kaiser's unfair labor practice defense if it were asserting

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lins v. *Reitz Coal Co.*, 105 LRRM 2776, 2780 (D.D.C. 1979); *Lewis* v. *Seanor Coal Co.*, 256 F. Supp. 456, 460 (W.D. Pa. 1966), *aff'd*, 382 F.2d 437 (3d Cir. 1967), *cert. denied*, 390 U.S. 947 (1968); see *New Mexico Carpenters* v. *Mayhew Co.*, No. 79-1639, slip op. at 4 (10th Cir. June 24, 1981) ("[a]n unfair labor practice, in this case only a possibility, does not constitute a ground on which a court hearing a § 301 action can find an agreement unenforceable"); *Trust Fund Services* v. *Heyman*, 15 Wash. App. 452, 550 P.2d 547, 549-50 (1976) *aff'd*, 88 Wash. 2d 698, 565 P.2d 805, *cert. denied*, 434 U.S. 987 (1977). Kaiser argues that its position is supported by *Perma-Line Corp.* v. *Sign Pictoral Union, Local 230*, 639 F.2d 890 (2d Cir. 1981); *Frito-Lay, Inc.* v. *Retail Clerks Local 7*, 629 F.2d 653 (10th Cir. 1980); *United Optical Workers Local 4708* v. *Sterling Optical Co.*, 500 F.2d 220 (2d Cir. 1974); *Lewis* v. *Seanor Coal Co.*, 382 F.2d 437 (3d Cir. 1967), *cert. denied*, 390 U.S. 947 (1968); and *Todd Shipyards Corp.* v. *Indus. Marine Workers Local 39*, 344 F.2d 107 (2d Cir. 1965). (Pet. Br. 39-41 & n.n.74-76.) In *Frito-Lay, Inc.* and *United Optical Workers Local 4708*, the courts never reached or decided the question. In *Seanor*, the District Court found the employer's § 8(e) defense to be within the exclusive jurisdiction of the Board, 256 F. Supp. 456, 460, and the Third Circuit did not reach the question. *Perma-Line* did not discuss the exclusive jurisdiction doctrine, although it did hold that in an action to confirm an arbitrator's award a court may decide whether a contract violates §§ 8(a)(3) and 8(b)(2) of the NLRA. *Todd*, a case supportive of Kaiser's position, rested on a misapplication of the then-recent decision in *Smith* v. *Evening News Ass'n*, 371 U.S. 195 (1962). See p. 35, *infra*.

a violation of some other subsection of § 8, the "unenforcible and void" language of § 8(e) permits the courts to resolve 8(e) claims without a determination from the NLRB in the first instance. (Pet. Br. 35-41.)[26]

Kaiser misreads the "unenforcible and void" language of § 8(e). That language was not intended to import into § 8(e) a separate enforcement mechanism independent of proceedings before the Board. Instead, that language was used to make enforcement of hot cargo agreements, whenever executed, an unfair labor practice subject to the exclusive jurisdiction of the Board and to describe the status of agreements after the NLRB has determined them to be within the proscription of § 8(e). The history of § 8(e) makes this clear.

In 1947, Congress passed the Taft-Hartley Act, adding § 8(b)(4)(B) to the NLRA, 29 U.S.C. § 158(b)(4)(B), which makes it an unfair labor practice for a labor organization, by strike or similar means, to coerce a neutral employer in order to put pressure on another employer with whom the union has a dispute. *National Woodwork Mfrs. Ass'n* v. *NLRB*, 386 U.S. 612 (1967). Section 8(b)(4)(B), however, does not make it unlawful for a union and an employer to enter into an agreement which has these secondary effects. *Local 1976, United Bhd. of Carpenters* v. *NLRB* (*Sand Door*), 357 U.S. 93 (1958).

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[26] In reaching that conclusion, Kaiser also relies on several statements in the legislative history of § 8(e). (Pet. Br. 36-37 n.68.) Most of those statements simply reiterate the statutory language and are fully consistent with application of the exclusive jurisdiction doctrine. In addition, Kaiser quotes a post-enactment statement by Senator Goldwater. (*Id.* at 38 & n.70.) Such a post-passage remark represents only the personal view of the legislator and is entitled to no weight. *Regional Rail Reorganization Act Cases*, 419 U.S. 102, 132 (1974); *National Woodwork Mfrs. Ass'n* v. *NLRB*, 386 U.S. 612, 639 n.34 (1967). In any event, Senator Goldwater's statement does not address the issue of who determines whether a clause violates § 8(e), but rather says only that an unlawful clause may not be a basis for damages or equitable relief. It is accordingly not relevant to the applicability of the exclusive jurisdiction doctrine.

In 1959, Congress enacted the Labor-Management Reporting and Disclosure Act ("LMRDA") and plugged this "loophole" in the law of "secondary boycotts" by adding § 8(e) of the NLRA.

Section 8(e) was first introduced as an amendment to the Senate bill by Senator Gore. 105 Cong. Rec. S5887-89 (daily ed. April 23, 1959), *reprinted in* II Legislative History of the Labor-Management Reporting and Disclosure Act of 1959 ("Leg. Hist.") at 1161-63 (1959). Senator Gore explained that "[t]he purpose of the amendment is to declare and make it 'an unfair labor practice' " to enter into a hot cargo agreement. *Id.* at 1163. Senator Kennedy, a principal sponsor of the Act and supporter of the amendment, suggested that the Senate consider requiring the Board to give priority "to the handling of unfair labor practices arriving under this provision." *Id.* Senator Gore's and Senator Kennedy's statements make clear that when § 8(e) was introduced the intention was simply to add entering into a hot cargo agreement to the list of unfair labor practices defined in § 8 and regulated by the Board. There was no intention to create a unique unfair labor practice cognizable in the courts.

This original intention did not change when, two days later, Senator Smathers, on behalf of himself and Senator Long, proposed that Senator Gore's amendment be supplemented with the following provision:

> "Any contract between an employer and a labor organization or its agents heretofore or hereafter executed which is, or which calls upon anyone to engage in, an unfair labor practice under section 8(e) of the National Labor Relations Act, as amended, shall to such extent be unenforceable and void." 105 Cong. Rec. S6033 (daily ed. April 25, 1959), *reprinted in* II Leg. Hist. 1242.

Senator Smathers introduced this amendment as part of a package that also brought § 8(e) violations within the ambit of § 10(l) of the NLRA, 29 U.S.C. § 160(l), which instructs the NLRB to give priority to certain specified unfair labor practice charges and authorizes it

to seek temporary injunctive relief in the courts pending final Board adjudication whenever it has reasonable cause to believe such a charge is true. Senator Smathers explained the purpose of his amendment:

> "In the original amendment offered by the able junior Senator from Tennessee [Senator Gore], *it was made an unfair labor practice for there to be put into a contract to be entered into a hot-cargo clause.* The amendment which has been proposed by me and the junior Senator from Louisiana would provide that the *same prohibition should apply to contracts now in existence.* . . . [It] would [also] make such unfair labor practices subject to the mandatory injunction provisions of section 10(l). . . ." *Id.* (emphasis supplied).

Senator Smathers' amendment was thus an effort to close a loophole remaining in Senator Gore's proposal that "enter[ing] into" a hot cargo agreement be made an unfair labor practice. Senator Gore's proposal could have been interpreted as not proscribing enforcement of hot cargo contracts "enter[ed] into" either (a) prior to enactment of the LMRDA, even though prohibiting the Teamsters from enforcing such agreements was the principal impetus for the legislation, *id.*, or (b) after enactment, but outside the six-month statute of limitations for unfair labor practices, 29 U.S.C. § 160(b).

To ensure that enforcement of a hot cargo contract, whenever executed, would be subject to the NLRB's unfair labor practice jurisdiction, Congress accepted the Smathers' amendment and declared that any agreement "entered into heretofore or hereafter containing such [a hot cargo clause] shall be to such extent unenforcible and void. . . ." 29 U.S.C. § 158(e).[27] There is no legis-

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[27] The initial Senate bill was limited to the motor carrier industry. After the Senate bill passed, the House passed a bill prohibiting all hot cargo agreements, not just those in the motor carrier industry. H.R. Rep. No. 1147, 86th Cong., 1st Sess. 38 (1959), *reprinted in* I Leg. Hist. 943. The language enacted as § 8(e) was subsequently drafted in the Senate to cover all hot cargo

lative history indicating that Congress intended by adoption of this language to remit responsibility for adjudicating such unfair labor practices to the courts, rather than lodging it in the Board.[28] That Congress intended determination and remediation of § 8(e) claims to be committed exclusively to the Board is also supported by the other enacted feature of the Smathers amendment package, which amended § 10(l) so as to direct the Board to give priority to § 8(e) charges and to seek immediate injunctive relief if it has reasonable cause to believe that a § 8(e) charge is meritorious.[29]

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agreements not specifically excepted. 105 Cong. Rec. S15906 (daily ed. Aug. 28, 1959), *reprinted in* II Leg. Hist. 1383.

[28] Decisions of the Board and the courts following on the heels of enactment of § 8(e) confirm that the "unenforcible and void" language was included to ensure that enforcement of a hot cargo agreement, whenever executed, would be within the unfair labor practice jurisdiction of the Board. In *Dist. No. 9, Int'l Ass'n Machinists* v. *NLRB*, 315 F.2d 33, 35 (D.C. Cir. 1962), *enf'g* 134 NLRB 1354 (1961), the court, speaking through Judge Fahy, affirmed the Board's determination that enforcement of a hot cargo agreement executed prior to the effective date of § 8(e) is an unfair labor practice: "Since agreements condemned by section 8(e) are declared to be 'unenforcible and void,' to reinstate an earlier one, as was here done, is in substance to enter into it. Accordingly, we accept the Board's position on this branch of the case." *Accord, Los Angeles Mailers Union No. 9* v. *NLRB*, 311 F.2d 121, 125 (D.C. Cir. 1962) *enf'g* 135 NLRB 1132 (1962) (enforcement of a hot cargo agreement executed after the effective date of § 8(e) is an unfair labor practice); see also *Bricklayers Union* v. *NLRB*, 562 F.2d 775, 781-83 (D.C. Cir. 1977) (acts of continued enforcement of a hot cargo agreement constitute an unfair labor practice within the statute of limitations).

[29] Congress' intent not to except § 8(e) from the NLRB's exclusive jurisdiction is also evidenced by the fact that it acted specifically in the LMRDA to remedy perceived problems arising from that exclusive jurisdiction. Congress added § 14(c) to the NLRA, 29 U.SC. § 164(c), which authorizes the Board to decline jurisdiction, *inter alia*, over limited classes of unfair labor practice disputes and, upon such declination, preserves the right of state agencies and courts to assume jurisdiction of the dispute. This legislative context emphasizes that Congress would have expressly

C. Application of the Exclusive Jurisdiction Doctrine to Kaiser's § 8(e) Defense Is Consistent with this Court's Decisions in *Connell* and *Lucas Flour*

Kaiser argues that the principles articulated in this Court's opinions in *Connell Constr. Co.* v. *Plumbers Local 100*, 421 U.S. 616 (1975), and *Local 174, Teamsters* v. *Lucas Flour Co.*, 369 U.S. 95 (1962), permit judicial determination of its § 8(e) defense. Kaiser misreads those cases.

1. *The* Connell *Decision*

In *Connell*, an employer filed suit against a union seeking a determination that an agreement that it had signed under duress violated the Sherman Act. The union defended on the ground that its conduct was protected from the antitrust laws by the "construction industry proviso" to § 8(e), which specifically authorized the agreement at issue. This Court ruled that the union's defense was cognizable in federal court because "the federal courts may decide labor law questions that emerge as collateral issues in suits brought under independent federal remedies, including the antitrust laws." 421 U.S. at 626 (footnote omitted). Kaiser argues that this principle gives the federal courts jurisdiction over its § 8(e) defense. (Pet. Br. 41.)

Kaiser's argument, however, fails to recognize that the "collateral" labor issue resolved in *Connell* was quite different from the issue Kaiser is asking the courts to resolve. In *Connell*, the union was not claiming that an unfair labor practice had been committed; it was assert-

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excepted § 8(e) from the NLRB's exclusive jurisdiction had that been its intent.

Moreover, Congress in 1959 did not amend § 303 of the LMRA, 29 U.S.C. § 187, to provide a damages remedy for violation of § 8(e). See *Atchison, T. & S.F. Ry.* v. *Local 70, Teamsters*, 511 F.2d 1193, 1195 (9th Cir. 1975) (per curiam). As the Court of Appeals noted, "When Congress has spoken so directly on the remedies to be provided for statutory violations, it is not for the courts to add remedies [*i.e.*, contract avoidance] of their own." (642 F.2d at 1313; Pet. App. 21a.)

ing that its conduct, which otherwise was *concededly* unlawful under § 8(e),[30] was affirmatively protected by the construction industry proviso. Brief for Respondent at 10-11, *Connell Constr. Co.* v. *Plumbers Local 100.* The question raised by the union could not have been addressed by the NLRB because the Board does not have jurisdiction to decide the scope of § 8(e) absent a charge that an unfair labor practice has occurred. *NLRB* v. *Indiana & Michigan Elec. Co.*, 318 U.S. 9, 17-18 (1943). As a consequence, there was no mechanism for obtaining an NLRB determination of the "collateral" labor law issue before the Court in *Connell.* See *Sears, Roebuck & Co.* v. *Carpenters*, 436 U.S. at 197, 202-03; *Local 189, Amalgamated Meat Cutters* v. *Jewel Tea Co.*, 381 U.S. 676, 687 (1965) (opinion of White, J.). Kaiser, however, could have filed a charge with the Board seeking a determination that the purchase-of-coal clause violates § 8(e). Where the precise labor law issue a party requests the courts to resolve could be presented to the Board pursuant to its unfair labor practice jurisdiction, the exclusive jurisdiction doctrine requires that it *must* be presented to the Board, not the courts.[31] *E.g., Sears, Roebuck & Co.* v. *Carpenters*, 436 U.S. at 197.

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[30] The Court in *Connell* did *not* decide that the union violated § 8(e). Rather, the parties and the Court *assumed* that if the union's conduct was not sheltered by the proviso, it was violative of § 8(e). The labor law issue decided by the Court in *Connell* was a purely legal one involving the meaning of the construction industry proviso. By contrast, the issue Kaiser asks the courts to decide is whether entering into the 1974 Agreement was an unfair labor practice and that involves complex factual questions calling for application of the Board's specialized expertise. See, *e.g., NLRB* v. *Int'l Longshoremen's Ass'n*, 447 U.S. 490 (1980).

[31] Kaiser also relies heavily on a statement in a footnote to Justice Stewart's dissenting opinion in *Connell* (Pet. Br. 39), where he remarked that a signatory employer of a voluntary agreement violative of § 8(e) is "protected from any damage that might result from the illegal 'hot cargo' agreement by his ability to simply ignore the contract provision that violates § 8(e)." 421 U.S. at 649-50 n.9. This dictum is not on point. Justice Stewart's remark concerned agreements violative of § 8(e), not the logically

2. *The Principle of* Lucas Flour

Relying on *Local 174, Teamsters* v. *Lucas Flour Co.*, 369 U.S. 95, 101 n.9 (1962), Kaiser argues that the NLRB exclusive jurisdiction doctrine is inapplicable here because this case was brought pursuant to § 301 of the LMRA to enforce a collective bargaining agreement. (Pet. Br. 42.)[32] *Lucas Flour*, as well as many other decisions (*e.g.*, *Smith* v. *Evening News Ass'n*, 371 U.S. 195, 197 (1962); *Atkinson* v. *Sinclair Ref. Co.*, 370 U.S. 238, 245 n.5 (1962)), stand for the proposition that federal courts are not precluded from deciding contract claims in § 301 suits simply because the breach, if proven, might *also* be an unfair labor practice. See *Sears, Roebuck & Co.* v. *Carpenters*, 436 U.S. at 189 n.14. The courts in these cases were not asked to determine whether certain conduct constituted an unfair labor practice, but only whether a contract had been breached, a matter § 301 grants the federal courts unquestioned jurisdiction to decide. Here, on the other hand, Kaiser seeks to have the courts determine whether entering into the 1974 Agreement constituted an unfair labor practice under § 8(e), a matter squarely within the Board's exclusive jurisdiction.[33]

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prior question of who initially determines whether a § 8(e) unfair labor practice has occurred. Moreover, even if Justice Stewart's remark was meant to extend to contracts arguably proscribed by § 8(e) but not found to be unlawful by the Board, certainly it does not mean that an employer can "ignore" the agreement after it has been sued on the contract. Here, Kaiser could have sought an NLRB determination that the purchase-of-coal clause violates § 8(e) after the present suit was filed, but chose not to do so.

[32] Kaiser also cites *Vaca* v. *Sipes*, 386 U.S. 171 (1967), where this Court sustained the jurisdiction of courts to adjudicate claims for breach of the union's duty of fair representation. The considerations on which the Court relied in reaching that conclusion are inapposite here. *Id.* at 180-83.

[33] It has been recognized repeatedly that § 301 does not grant the courts jurisdiction over unfair labor practice claims and defenses. *New Mexico Carpenters* v. *Mayhew Co.*, No. 79-1639, slip op. at 4 (10th Cir. June 24, 1981); *Castaneda* v. *Dura-Vent Corp.*, 648 F.2d 612, 616 (9th Cir. 1981); *Orange Belt District Council* v.

D. Kaiser's Argument that the Court of Appeals' Construction of § 8(e) Is Unconstitutional Was Not Raised Below and Is Without Merit

Kaiser contends that § 8(e), if construed consistently with the doctrine of NLRB exclusive jurisdiction, is unconstitutional because it leaves "employers like Kaiser Steel with the prospect that they may be compelled to comply with a contract clause the lawfulness of which *no court* has been able to review." (Pet. Br. 45.) Although the issue whether Kaiser's § 8(e) defense is judicially cognizable was litigated and decided by both the District Court and the Court of Appeals, Kaiser never presented this constitutional argument to those courts. Thus, this Court should not entertain Kaiser's constitutional argument because it was neither raised before nor considered by the District Court or the Court of Appeals. *Miree* v. *DeKalb County*, 433 U.S. 25, 33-34 (1977); *Adickes* v. *S.H. Kress & Co.*, 398 U.S. 144, 147 n.2 (1970); *California* v. *Taylor*, 353 U.S. 553, 557 n.2 (1957).

In any event, Kaiser's constitutional argument is insubstantial. Section 8 of the NLRA creates no private rights respecting enforcement of the proscription of unfair labor practices. Unfair labor practices are by statute made matters of public concern. The statute sets forth a definite and restricted procedure for determination of these matters. *Amalgamated Utility Workers* v. *Consolidated Edison Co.*, 309 U.S. 261 (1940). If the NLRB's General Counsel decides not to issue a complaint, that decision is unreviewable. *NLRB* v. *Sears, Roebuck & Co.*, 421 U.S. 132, 138-39 (1975). The constitutionality of the NLRB's exclusive jurisdiction was specifically upheld in *Myers* v.

Maloney Specialties, Inc., 639 F.2d 487, 491 (9th Cir. 1980); *Waggoner* v. *R. McGray, Inc.*, 607 F.2d 1229, 1234-35 (9th Cir. 1979); *Atchison, T. & S.F. Ry.* v. *Local 70, Teamsters*, 511 F.2d 1193, 1195 (9th Cir. 1975); *Pennington* v. *UMW*, 325 F.2d 804, 819 (6th Cir. 1963), *cert. denied*, 381 U.S. 949 (1965). Moreover, in *Motor Coach Employees* v. *Lockridge*, 403 U.S. 274, 300-01 (1971), this Court recognized, in a different context, that § 301 actions are exempted from the exclusive jurisdiction doctrine only to the extent that courts may decide traditional contract law questions.

Bethlehem Shipbuilding Corp., 303 U.S. 41, 48 (1938). In short, the Act is not designed to provide for individual relief but to protect broader public rights and Congress is constitutionally free to shape those rights by establishing limited procedures for their determination.

Kaiser contends that § 8(e), as interpreted by the Court of Appeals, is unconstitutional because it "intrudes upon the federal courts' ability to decide contract enforcement actions . . . and thus offends the constitutional requirement of the separation of powers." (Pet. Br. 44.) Beyond the fact that Kaiser, as noted, has no private rights respecting enforcement of § 8(e), it is well-recognized that Congress may constitutionally establish exclusive jurisdiction over a particular question in a single forum and deprive federal courts of the power to consider that question when raised by way of defense to suits over which those courts have jurisdiction. *Yakus* v. *United States*, 321 U.S. 414 (1944); *Bowles* v. *Willingham*, 321 U.S. 503 (1944).

IV. THE MULTIEMPLOYER PENSION PLAN AMENDMENTS ACT OF 1980 REQUIRES AFFIRMANCE OF THE COURT OF APPEALS' JUDGMENT

Nine days after the Court of Appeals rendered the decision under review, Congress enacted legislation—the Multiemployer Pension Plan Amendments Act of 1980, Pub. L. No. 96-364, 94 Stat. 1208 ("the Multiemployer Pension Act" or "the Act")—that confirms the principles applied by the Court of Appeals and requires affirmance of its judgment.

The overall purpose of the Multiemployer Pension Act, as expressed by the Congress, is to foster the financial soundness and growth of multiemployer pension plans, because "the continued well-being and security of millions of employees, retirees, and their dependents are directly affected by multiemployer pension plans."[34] To achieve

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[34] Section 3(a)(3), 94 Stat. 1209, 29 U.S.C.A. § 1001a(a)(3) (West Supp. 1976-80). The Funds are "multiemployer pension plans" within the meaning of the Act. Section 207, 94 Stat. 1288, 26 U.S.C.A. § 414(f) (West Supp. 1981).

that purpose, the Act amends ERISA in a number of ways, including the creation of a direct and unambiguous ERISA cause of action for the collection of delinquent contributions by trustees of multiemployer plans. Thus, § 306(a) adds a new § 515 to ERISA which provides:

> "Every employer who is obligated to make contributions to a multiemployer plan under the terms of the plan or under the terms of a collectively bargained agreement shall, to the extent not inconsistent with law, make such contributions in accordance with the terms and conditions of such plan or such agreement." 94 Stat. 1295, 29 U.S.C.A. § 1145 (West Supp. 1976-80).[35]

The language and legislative history of § 306(a) make clear that Congress intended § 306(a) to enable multiemployer plans to recover delinquent contributions expeditiously, free of defenses reflecting labor-management disputes over issues such as the legality of the collective bargaining agreement giving rise to the obligation to contribute. That language unambiguously requires employers to make contributions "in accordance with the terms and conditions" of their agreement. The entire legislative history of § 306(a) confirms that Congress' purpose was to preclude "claims and defenses" which are not grounded in the terms and conditions of the agreement—such as the antitrust and § 8(e) defenses Kaiser seeks to raise. Indeed, that history specifically indicates

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[35] The Solicitor General directed the Court's attention to this recent statute in a letter suggesting that, because § 306(a)—which has not been subject to examination by the lower courts—may bear importantly on the issues in this case and similar cases in the future, the Court should consider dismissing the writ of certiorari as improvidently granted. Letter from Wade H. McCree, Jr., to Alexander L. Stevas (May 27, 1981). Counsel for respondents then wrote the Court supporting the Solicitor General's suggestion, letter from Stephen J. Pollak to Alexander L. Stevas (June 2, 1981), and counsel for petitioner wrote the Court opposing the suggestion, letter from A. Douglas Melamed to Alexander L. Stevas (June 3, 1981). The Court declined to take action as a result of this correspondence. Letter from Alexander L. Stevas to Wade H. McCree, Jr. (June 12, 1981).

that § 306(a) is a statutory endorsement of certain judicial decisions analytically indistinguishable from the Court of Appeals' ruling and an overruling of decisions that have allowed employer defenses analogous to those Kaiser seeks to raise. In accordance with its purpose, § 306(a) permits an employer contractually obligated to contribute to a multiemployer plan to assert only one illegality defense: that the payment would violate § 302 (a) of the LMRA, 29 U.S.C. § 186(a), which proscribes payments by an employer to a representative of his employees in the absence of a qualified trust. That defense is not at issue here. Contrary to Kaiser's contention (letter of June 3, 1981, see note 35, *supra*), § 306 (a) applies to cases pending on the date of enactment, and hence requires affirmance of the Court of Appeals' judgment.

A. The Legislative History of § 306(a) Confirms that Employer Claims and Defenses Not Grounded in the Terms of the Agreement Are Barred

When introduced in Congress, neither the bill that became the Multiemployer Pension Act, H.R. 3904, nor the Senate counterpart, S. 1076, contained any provision relating to recovery of delinquent employer contributions. 125 Cong. Rec. H2677 (daily ed. May 3, 1979); 125 Cong. Rec. S5291 (daily ed. May 3, 1979). During the legislative process, Congress determined that protecting the financial stability of multiemployer plans required addressing the problem of employers failing to make promised contributions to such plans. In April 1980, the Senate Committee on Labor and Human Resources, chaired by Senator Williams, amended S. 1076 to include a delinquent contributions provision essentially identical to that which would be enacted as § 306(a).[36] Senate Labor and Human Resources

[36] This provision was foreshadowed in an earlier bill. See Senate Labor and Human Resources Committee, "S. 209: The ERISA Improvements Act of 1979," 96th Cong., 1st Sess. 45, 124 (unnumbered Comm. Print November 1979) ("1979 Sen. Labor Comm. Print").

Committee, "S. 1076: The Multiemployer Pension Plan Amendments Act of 1980," 96th Cong., 2d Sess. 242 (unnumbered Comm. Print April 1980) ("1980 Sen. Labor Comm. Print"). After noting the serious problems posed for multiemployer plans by "[f]ailure of employers to make promised contributions in a timely fashion" (*id.* at 43), the Committee explained the purpose of this amendment:

> "Recourse available under current law for collecting delinquent contributions is insufficient and unnecessarily cumbersome and costly. Some simple collection actions brought by plan trustees have been converted into lengthy, costly and complex litigation concerning claims and defenses unrelated to the employer's promise and the plan's entitlement to the contributions. This should not be the case. Federal pension law must permit trustees of plans to recover delinquent contributions efficaciously. Sound national pension policy demands that employers who enter into agreements providing for pension contributions not be permitted to repudiate their pension promises.
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> "The public policy of this legislation to foster the preservation of the private multiemployer plan system mandates that provision be made to discourage delinquencies and simplify delinquency collection. The bill imposes a Federal statutory duty to contribute on employers that are already contractually obligated to make contributions to multiemployer plans." *Id.* at 44.

On May 22, 1980, the House passed H.R. 3904 without a provision comparable to that in the Senate Labor Committee bill providing for recovery of delinquent contributions. 126 Cong. Rec. H4158 (daily ed. May 22, 1980).

After the House passed H.R. 3904, the Senate Committee on Finance and the Senate Committee on Labor and Human Resources jointly formulated and reported to the Senate a version of S. 1076 which contained the provision of the Senate Labor Committee bill, now § 306(a), designed to prohibit employers from resisting suits for

delinquent contributions to multiemployer pension plans by raising defenses involving complex issues between the employer and the union, such as the alleged unlawfulness of the collective bargaining agreement. 126 Cong. Rec. S10094 (daily ed. July 29, 1980). During Senate floor debate on the joint Finance-Labor bill, Senator Matsunaga (a member of the Finance Committee) and Senator Williams (sponsor, floor manager, and Chairman of the Labor and Human Resources Committee) engaged in a colloquy over the purpose of § 306(a):

> "Mr. MATSUNAGA. If I may pose a further question, in some recent cases such as the Washington Area Carpenters Fund Overhead Door Co. case, a simple collection action brought by plan trustees has been converted into lengthy, costly, and complex litigation concerning claims and defenses unrelated to the employer's promise of contributions and the plan's entitlement to the contributions. Would the bill correct this situation?
>
> "Mr. WILLIAMS. I feel that it would correct the situation. It is essential to the financial health of multiemployer plans that they and their actuaries be able to rely on an employer's contribution promises.
>
> "Further, plan participants for whom the employer promises to make pension contributions to the plan in exchange for their labor are entitled to rely on their employer's promises. The bill clarifies the law in this regard by providing a direct ERISA cause of action against a delinquent employer without regard to extraneous claims or defenses." 126 Cong. Rec. S10102 (daily ed. July 29, 1980).[37]

The bill passed the Senate the same day. *Id.* at S10169.

On August 25, 1980, the House debated whether to accede to the Senate substitute bill. 126 Cong. Rec.

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[37] Statements of legislative sponsors are entitled to substantial weight in interpreting a statute. *Simpson* v. *United States*, 435 U.S. 6, 13 (1978); *National Woodwork Mfrs. Ass'n* v. *NLRB*, 386 U.S. 612, 640 (1967); *Textile Workers Union* v. *Lincoln Mills*, 353 U.S. 448, 455-56 (1957).

H7863-7910 (daily ed. Aug. 26, 1980). During that debate Rep. Thompson (sponsor, floor manager, and chairman of the responsible House subcommittee) explained the purpose and meaning of § 306(a):

> "Recourse available under current law for collecting delinquent contributions is insufficient and unnecessarily cumbersome and costly. Some simple collection actions brought by plan trustees have been converted into lengthy, costly, and complex litigation concerning claims and defenses unrelated to the employer's promise and the plans' entitlement to the contributions. This should not be the case. Federal pension law must permit trustees of plans to recover delinquent contributions efficaciously, and without regard to issues which might arise under labor-management relations law—other than 29 U.S.C. 186. Sound national pension policy demands that employers who enter into agreements providing for pension contributions not be permitted to repudiate their pension promises.
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> "In this regard we endorse judicial decisions such as *Lewis* v. *Benedict Coal Corp.*, 361 U.S. 459 (1960); *Lewis* v. *Mill Ridge Coals, Inc.*, 298 F.2d 552 (6th Cir., 1962); and *Huge* v. *Long Hauling Company, Inc.*, 590 F.2d 457 (3rd Cir., 1978). Cases such as *Western Washington Laborers-Employers Health and Security Trust Funa* v. *McDowell*, —— F. Supp. ——, 103 LRRM 2219 (W.D. Wash., 1979) and *Washington Area Carpenters Welfare Fund, et al.* v. *Overhead Door Company*, C.A. No. 79-0097, USDC D.C., April 22, 1980, are considered to have been incorrectly decided and this legislation is intended to clarify the law in this respect by providing a direct, unambiguous ERISA cause of action to a plan against a delinquent employer." 126 Cong. Rec. H7899 (daily ed. Aug. 26, 1980).

With certain amendments not relevant here, the House adopted the Senate substitute, including the delinquent contributions provision. 126 Cong. Rec. H7910 (daily ed. Aug. 26, 1980).

On August 26, 1980, the Senate considered the House amendments to the Senate substitute. During the floor debate, Floor Manager Williams explained the purpose of § 306(a) in the same terms as Rep. Thompson. 126 Cong. Rec. S11673 (daily ed. Aug. 26, 1980). Without further change of consequence here, the bill passed the Senate on September 18, 1980, 126 Cong. Rec. S12901 (daily ed. Sept. 18, 1980), and the House on the following day, 126 Cong. Rec. H9179 (daily ed. Sept. 19, 1980). President Carter signed it into law on September 26, 1980.

B. The Endorsement and Disapproval of Specific Judicial Decisions in the Legislative History Confirm that § 306(a) Precludes Kaiser's Antitrust and § 8(e) Defenses

Sen. Williams and Rep. Thompson explained the purpose of § 306(a) in part by referring to several judicial decisions analytically indistinguishable from the case at bar. They said that § 306(a) represents a legislative endorsement of *Lewis* v. *Benedict Coal Corp.*, *supra*, and *Huge* v. *Long's Hauling Co.*, *supra*, and a statutory overruling of *Washington Area Carpenters' Welfare Fund* v. *Overhead Door Co.*, 488 F.Supp. 816 (D.D.C. 1980), *appeal pending*, (D.C. Cir. No. 80-1501), and *Western Washington Trust Fund* v. *McDowell*, 103 LRRM 2219 (W.D. Wash. 1979), *appeal pending*, (9th Cir. No. 80-3024).[38]

The Court of Appeals' refusal to entertain Kaiser's illegality defenses rests on the principles of *Benedict* and *Long's Hauling*. On the other hand, the disapproved

[38] See also 1980 Sen. Labor Comm. Print 44; 126 Cong. Rec. S10102 (daily ed. July 29, 1980) (colloquy between Sen. Matsunaga and Sen. Williams). The sponsors also expressly approved *Lewis* v. *Mill Ridge Coals, Inc.*, 298 F.2d 552 (6th Cir. 1962), *aff'g* 188 F.Supp. 4 (E.D. Ky. 1960), where it was held that *Benedict* precludes an employer from defending a pension plan's claim for delinquent royalties on the ground that the agreement providing for payments is void for want of consideration due to misconduct by the trustees of the plan.

Overhead Door and *McDowell* cases recognized the *Higdon* defense, which, like the antitrust and labor law defenses Kaiser seeks to raise, is a challenge to the very agreement under which collection is being sought. See p. 3 & n. 12, *supra*. The explicit legislative references to these decisions underscore that § 306(a) precludes Kaiser's antitrust and § 8(e) defenses.

C. Under § 306(a), the Only Permissible Illegality Defense Is That Payment Would Violate § 302 of the LMRA

Apart from legitimate disputes over whether an employer is in breach of a contractual obligation to make contributions to a multiemployer plan, § 306(a) permits only one defense to be raised in suits to recover delinquent contributions: that the payment of such contributions would be "inconsistent with law." Kaiser has not asserted such a defense.

During final floor debate on the legislation, Sen. Williams and Rep. Thompson carefully explained the intent of § 306(a): "Federal pension law must permit trustees of plans to recover delinquent contributions efficaciously, and without regard to issues which might arise under labor-management relations law—other than 29 U.S.C. 186." 126 Cong. Rec. S11673 (daily ed. Aug. 26, 1980) (remarks of Sen. Williams); 126 Cong. Rec. H7899 (daily ed. Aug. 26, 1980) (remarks of Rep. Thompson).[39] Thus, under § 306(a), the only illegality defense permitted is one based on 29 U.S.C. § 186—*i.e.*, § 302 of the LMRA.

Such a defense differs fundamentally from the defenses Kaiser seeks to raise. Section 302(a) of the LMRA generally prohibits an employer from making payments to any representative of his employees. *NLRB* v. *Amax Coal Co.*, No. 80-692, 49 U.S.L.W. 4880, 4882 (June 12, 1981). However, § 302(c)(5) expressly excepts from the general proscription of § 302(a) employer contributions to an employee benefit fund that meets

[39] See also 1979 Sen. Labor Comm. Print 45, 124.

specified requirements. The strict requirements on employee trust funds imposed by § 302(c)(5) are designed to ensure that employer contributions are used for the sole and exclusive benefit of the employees, their families, and dependents. Congress intended to allow § 302 of the LMRA to be asserted in defense to a trustee collection suit because where meritorious the defense would render inapplicable Congress' purpose to foster the growth and stability of qualified employee trust funds. Thus, Congress carefully drafted § 306(a) to ensure that trust funds satisfying the strictures of § 302(c)(5) (as the Funds administered by the Trustees do (J.A. 28)) could collect delinquent contributions unencumbered by defenses arising out of employer-union disputes.

The language of § 306(a) reflects the distinction between the defenses Kaiser seeks to raise and the narrow defense permitted by Congress. The text of § 306(a) provides that every employer obligated by a plan or collective bargaining agreement to make contributions to a multiemployer plan "shall, to the extent not inconsistent with law, make such contributions in accordance with the terms and conditions of such plan or such agreement." This language must be parsed carefully. It does *not* say that every employer contractually obligated to contribute to a multiemployer plan shall make such contributions in accordance with the *lawful* terms and conditions of such agreement. Only if the act of making contributions is itself "inconsistent with law" (*i.e.*, violative of § 302(a) of the LMRA) may an employer defend failure to make promised contributions. Kaiser's performance of its contractual obligation to pay royalties to the Funds would not be "inconsistent with law" within the meaning of that phrase in § 306(a), and accordingly such performance is required by § 306(a) of the Multiemployer Pension Act.[40]

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[40] For an example of a dispute that would not be foreclosed by § 306(a) of the Multiemployer Pension Act, see *Walsh* v. *Schlecht*, 429 U.S. 401 (1977) (rejecting employer's argument that payment to employee benefit fund would violate § 302(a) of the LMRA).

D. Section 306(a) Applies to Pending Cases

Kaiser contends that § 306(a) does not apply to the case at bar (letter of June 3, 1981, see note 35, *supra*). It is well-settled, however, that "a court is to apply the law in effect at the time it renders its decision, unless doing so would result in manifest injustice or there is statutory direction or legislative history to the contrary." *Bradley* v. *Richmond School Bd.*, 416 U.S. 696, 711 (1974). *Accord, Cort* v. *Ash*, 422 U.S. 66, 76-77 (1975); *Thorpe* v. *Housing Auth.*, 393 U.S. 268, 281-83 (1969). The three narrow exceptions articulated in *Bradley* do not apply here, and accordingly § 306(a) must be applied by this Court in deciding this case.

Respecting "statutory direction," nothing in the Multiemployer Pension Act suggests that § 306(a) should not apply to cases pending on the date of its enactment. Kaiser suggests that § 108(c) provides otherwise (letter of June 3, 1981, see note 35, *supra*). On the contrary, that section simply provides that the amendments to ERISA made by the Act shall, with certain exceptions not relevant here, take effect on the date of enactment of the amendments. 94 Stat. 1267. Such a provision, however, does not bear on the question whether, once effective, the statute governs pending cases. See, *e.g.*, *NLRB* v. *Sears, Roebuck & Co.*, 421 U.S. 132, 164-65 (1975) (statute which Congress provided would take effect at a specified date after enactment applies to case instituted prior to enactment but pending on appeal after the statute's effective date); *Bradley*, 416 U.S. at 711-15 (same).

Similarly, nothing in the "legislative history" of § 306(a) indicates that it was intended not to apply to pending cases. On the contrary, the sponsors of the legislation, in explaining the purpose of § 306(a), expressly disapproved pending decisions, indicating that the provision was specifically intended to apply to cases still on appeal. 126 Cong. Rec. S11673 (daily ed. Aug. 26, 1980) (remarks of Sen. Williams); 126 Cong. Rec.

H7899 (daily ed. Aug. 26, 1980) (remarks of Rep. Thompson).[41]

Finally, application of § 306(a) to this case would not result in "manifest injustice." This Court has made clear that the important considerations in determining whether application of a new statute to a pending case would result in "manifest injustice" are the nature of the parties and the rights affected by the new law and the impact the law has on those rights. *Bradley*, 416 U.S. at 716-21. Section 306(a) involves matters of great national concern: "Sound national pension policy demands that employers who enter into agreements providing for pension contributions not be permitted to repudiate their pension promises." 126 Cong. Rec. S11673 (daily ed. Aug. 26, 1980) (remarks of Sen. Williams); 126 Cong. Rec. H7899 (daily ed. Aug. 26, 1980) (remarks of Rep. Thompson). As Chief Justice Marshall noted, "in great national concerns . . . the court must decide according to existing laws. . . ." *United States* v. *The Schooner Peggy*, 5 U.S. (1 Cranch) 103, 110 (1801), *quoted in Bradley*, 416 U.S. at 719. Moreover, no "new and unanticipated obligations [would] be imposed" upon Kaiser by application of § 306(a). *Bradley*, 416 U.S. at 720. Kaiser, a signatory to the 1974 Agreement, has long been aware of its obligation thereunder and prior to passage of § 306(a) two federal courts applied established legal principles to enforce Kaiser's promise.

In short, this case presents no cause for departure from the venerable rule that this Court will apply the

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[41] They expressly disapproved *Washington Area Carpenters' Welfare Fund* v. *Overhead Door Co.*, 488 F.Supp. 816 (D.D.C. 1980), *appeal pending*, (D.C. Cir. No. 80-1501, docketed May 9, 1980), and *Western Washington Trust Fund* v. *McDowell*, 103 LRRM 2219 (W.D. Wash. 1979), *appeal pending*, (9th Cir. No. 80-3024, docketed Jan. 11, 1980). (On June 12, 1981, the D.C. Circuit, *sua sponte*, ordered the *Overhead Door* appeal stayed pending this Court's decision in the case at bar. The *McDowell* case has been argued and submitted to the Ninth Circuit.)

law in effect at the time of its decision.[42] Accordingly, § 306(a) applies and precludes in this suit to recover delinquent pension fund contributions Kaiser's defense that the 1974 Agreement requiring those contributions is unlawful.

V. THE AWARD OF ATTORNEYS' FEES IS AUTHORIZED BY ERISA

Kaiser argues that the award of attorneys' fees to the Trustees lacked statutory authorization, that the only jurisdictional basis for this suit is § 301 of the LMRA, which does not authorize an award of attorneys' fees. (Pet. Br. 47-49.) Kaiser is wrong; the award is authorized by ERISA.

This case was brought by the Trustees both under § 301 of the LMRA and § 502 of ERISA. (J.A. 11.) Section 502(a)(3) of ERISA, 29 U.S.C. § 1132(a)(3) (1976), provides that a civil action may be brought

> "by a . . . fiduciary (A) to enjoin any act or practice which violates any provision of this subchapter or the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of this subchapter or the terms of the plan."

Section 502(g) of the Act in turn authorizes the district court to award attorneys' fees "[i]n any action under this subchapter by a . . . fiduciary." 29 U.S.C. § 1132(g) (1976).

Kaiser argues that this action does not properly arise under ERISA because, in Kaiser's view, this action was

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[42] This Court has already indicated that the Multiemployer Pension Act applies to cases pending on appeal after its enactment, as it recently relied on the Act to reverse a decision rendered prior to the Act's passage. In *NLRB* v. *Amax Coal Co.*, No. 80-692, 49 U.S.L.W. 4880 (June 29, 1981), this Court expressly relied on the Act in reversing a Third Circuit decision that "runs afoul of express congressional policy favoring multiemployer trusts." 49 U.S.L.W. at 4885 n.22. See also *Trustees, Local 387 Pension Fund* v. *Southern Stress Wire Corp.*, 509 F. Supp. 1097, 1104-05 (N.D. Ga. 1981) (applying § 306(a) in a case filed prior to its enactment).

not brought to enforce "either ERISA itself or the provisions of a pension plan" but only to enforce a collective bargaining agreement. (Pet. Br. 48.) This case was brought to enforce the UMW Benefit and Pension Plans. Article XX of the 1974 Agreement incorporates each of the four Plans (J.A. 28-29) and each of the four Plans in turn states that it was established "pursuant to Article XX of the Wage Agreement" and otherwise makes clear that employers were to fund the Plans according to Article XX's terms.[43] Thus, in failing to make the contributions called for by the purchase-of-coal clause, Kaiser violated not only the 1974 Agreement but also the Plans. Indeed, there can hardly be any more central or significant term of a multiemployer benefit plan than the term that provides for the payment of contributions and sets forth the manner in which the amount of each participating employer's contributions shall be determined. Numerous courts have awarded attorneys' fees in recognition that suits like this arise under ERISA.[44]

In addition, this suit was brought to enforce ERISA itself. *Huge* v. *Old Home Manor, Inc.*, 419 F.Supp. 1019 (W.D. Pa. 1976). The Act expressly requires trustees to discharge their fiduciary duties with the care and skill of a "prudent man." 29 U.S.C. § 1104(a)(1)(B). This standard imposes a duty on the Trustees to maximize the Funds' assets and requires them to institute litigation when necessary to collect delinquent contributions. See *Nedd* v. *UMW*, 556 F.2d 190 (3d Cir. 1977),

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[43] In addition, two of the Plans, the 1950 and 1974 Pension Plans, expressly state that "[c]ontributions to the [pension trusts] to fund the benefits under this Plan shall be paid solely by the Employers in accordance with Article XX of the Wage Agreement." The four Plans are not in the record because Kaiser did not oppose in the District Court the Trustees' request for attorneys' fees in their complaint and motion for summary judgment. (J.A. 14, 66.) Because Kaiser did not contest this issue in the District Court, respondents submit that it should not be considered here. *Cf. Adickes* v. *S.H. Kress & Co.*, 398 U.S. 144, 147 n.2, 157 n.16 (1970).

[44] See, *e.g.*, the cases cited by the Court of Appeals. (642 F.2d at 1320 n.14; Pet. App. 34a n.14).

cert. denied, 434 U.S. 1013 (1978). The Act also precludes trustees from extending credit to a "party in interest," 29 U.S.C. § 1106(a)(1)(B), defined to include an employer with employees covered by an ERISA plan, 29 U.S.C. § 1002(14). Had they failed to institute this suit, the Trustees would have risked violating this proscription.

Finally, § 306 of the Multiemployer Pension Act, 94 Stat. 1295, amends ERISA so as expressly to authorize the award of attorneys' fees in suits to recover contributions to a multiemployer plan pursuant to the terms of a collectively bargained agreement. 29 U.S.C.A. §§ 1145 and 1132(g)(2)(D) (West. Supp. 1976-80). This statute applies to the present case (pp. 46-48, *supra*) and hence provides a further ground for affirmance of the attorneys' fee award.

CONCLUSION

For the foregoing reasons, this Court should affirm the judgment below.

Respectfully submitted,

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APPENDICES

APPENDIX A

Sections 502(g), 515, and 4402(e) of the Employee Retirement Income Security Act of 1974, as amended and added by the Multiemployer Pension Plan Amendments Act of 1980, 94 Stat. 1208, 29 U.S.C.A. §§ 1132(g), 1145, and 1461(e) (West Supp. 1976-80).

29 U.S.C.A. § 1132(g) (as amended by § 306(b) of the Multiemployer Pension Plan Amendments Act of 1980):

> Attorney's fees and costs; awards in actions involving delinquent contributions
>
> (1) In any action under this subchapter (other than an action described in paragraph (2)) by a participant, beneficiary, or fiduciary, the court in its discretion may allow a reasonable attorney's fee and costs of action to either party.
>
> (2) In any action under this subchapter by a fiduciary for or on behalf of a plan to enforce section 1145 of this title in which a judgment in favor of the plan is awarded, the court shall award the plan—
>
> (A) the unpaid contributions,
>
> (B) interest on the unpaid contributions,
>
> (C) an amount equal to the greater of—
>
> (i) interest on the unpaid contributions, or
>
> (ii) liquidated damages provided for under the plan in an amount not in excess of 20 percent (or such higher percentage as may be permitted under Federal or State law) of the amount determined by the court under subparagraph (A),
>
> (D) reasonable attorney's fees and costs of the action, to be paid by the defendant, and

(E) such other legal or equitable relief as the court deems appropriate.

For purposes of this paragraph, interest on unpaid contributions shall be determined by using the rate provided under the plan, or, if none, the rate prescribed under section 6621 of Title 26.

29 U.S.C.A. § 1145 (as added by § 306(a) of the Multiemployer Pension Plan Amendments Act of 1980):

Delinquent contributions

Every employer who is obligated to make contributions to a multiemployer plan under the terms of the plan or under the terms of a collectively bargained agreement shall, to the extent not inconsistent with law, make such contributions in accordance with the terms and conditions of such plan or such agreement.

29 U.S.C.A. § 1461(e) (as added by § 108(c) of the Multiemployer Pension Plan Amendments Act of 1980):

Effective date; special rules

(1) Except as provided in paragraphs (2), (3), and (4), the amendments to this Act made by the Multiemployer Pension Plan Amendments Act of 1980 shall take effect on September 26, 1980.

(2)(A) Except as provided in this paragraph, part 1 of subtitle E of this subchapter, relating to withdrawal liability takes effect on April 29, 1980.

(B) For purposes of determining withdrawal liability under part 1 of subtitle E of this subchapter, an employer who has withdrawn from a plan shall be considered to have withdrawn from a multiemployer plan if, at the time of the withdrawal, the plan was a multiemployer plan as defined in section 1301(a)(3) of this title as in effect at the time of the withdrawal.

(3) Section 1421 through 1426 of this title, relating to multiemployer plan reorganization, shall

take effect, with respect to each plan, on the first day of the first plan year beginning on or after the earlier of—

(A) the date on which the last collective bargaining agreement providing for employer contributions under the plan, which was in effect on September 26, 1980, expires, without regard to extensions agreed to on or after September 26, 1980, or

(B) 3 years after September 26, 1980.

(4) Section 1415 of this title shall take effect on April 29, 1980.

APPENDIX B

Section 302 of the Labor-Management Relations Act, as amended, 29 U.S.C. § 186 (1976 & Supp. III, 1979).

29 U.S.C. § 186:

Restrictions on financial transactions

(a) Payment or lending, etc., of money by employer or agent to employees, representatives, or labor organizations

It shall be unlawful for any employer or association of employers or any person who acts as a labor relations expert, adviser, or consultant to an employer or who acts in the interest of an employer to pay, lend, or deliver, or agree to pay, lend, or deliver, any money or other thing of value—

(1) to any representative of any of his employees who are employed in an industry affecting commerce; or

(2) to any labor organization, or any officer or employee thereof, which represents, seeks to represent, or would admit to membership, any of the employees of such employer who are employed in an industry affecting commerce; or

(3) to any employee or group or committee of employees of such employer employed in an industry affecting commerce in excess of their normal compensation for the purpose of causing such employee or group or committee directly or indirectly to influence any other employees in the exercise of the right to organize and bargain collectively through representatives of their own choosing; or

(4) to any officer or employee of a labor organization engaged in an industry affecting commerce with intent to influence him in respect to any of his actions, decisions, or duties as a

representative of employees or as such officer or employee of such labor organization.

(b) Requests, demands, etc., for money or other thing of value

(1) It shall be unlawful for any person to request, demand, receive, or accept, or agree to receive or accept, any payment, loan, or delivery of any money or other thing of value prohibited by subsection (a) of this section.

(2) It shall be unlawful for any labor organization, or for any person acting as an officer, agent, representative, or employee of such labor organization, to demand or accept from the operator of any motor vehicle (as defined in part II of the Interstate Commerce Act [49 U.S.C. 301 et seq.]) employed in the transportation of property in commerce, or the employer of any such operator, any money or other thing of value payable to such organization or to an officer, agent, representative or employee thereof as a fee or charge for the unloading, or in connection with the unloading, of the cargo of such vehicle: *Provided*, That nothing in this paragraph shall be construed to make unlawful any payment by an employer to any of his employees as compensation for their services as employees.

(c) Exceptions

The provisions of this section shall not be applicable (1) in respect to any money or other thing of value payable by an employer to any of his employees whose established duties include acting openly for such employer in matters of labor relations or personnel administration or to any representative of his employees, or to any officer or employee of a labor organization, who is also an employee or former employee of such employer, as compensation for, or by reason of, his service as an employee of such employer; (2) with respect to the payment or delivery of any money or other thing of value in

satisfaction of a judgment of any court or a decision or award of an arbitrator or impartial chairman or in compromise, adjustment, settlement, or release of any claim, complaint, grievance, or dispute in the absence of fraud or duress; (3) with respect to the sale or purchase of an article or commodity at the prevailing market price in the regular course of business; (4) with respect to money deducted from the wages of employees in payment of membership dues in a labor organization: *Provided*, That the employer has received from each employee, on whose account such deductions are made, a written assignment which shall not be irrevocable for a period of more than one year, or beyond the termination date of the applicable collective agreement, whichever occurs sooner; (5) with respect to money or other thing of value paid to a trust fund established by such representative, for the sole and exclusive benefit of the employees of such employer, and their families and dependents (or of such employees, families and dependents jointly with the employees of other employers making similar payments, and their families and dependents): *Provided*, That (A) such payments are held in trust for the purpose of paying, either from principal or income or both, for the benefit of employees, their families and dependents, for medical or hospital care, pensions on retirement or death of employees, compensation for injuries or illness resulting from occupational activity or insurance to provide any of the foregoing, or unemployment benefits or life insurance, disability and sickness insurance, or accident insurance; (B) the detailed basis on which such payments are to be made is specified in a written agreement with the employer, and employees and employers are equally represented in the administration of such fund, together with such neutral persons as the representatives of the employers and the representatives of employees may agree upon and in

the event the employer and employee groups deadlock on the administration of such fund and there are no neutral persons empowered to break such deadlock, such agreement provides that the two groups shall agree on an impartial umpire to decide such dispute, or in event of their failure to agree within a reasonable length of time, an impartial umpire to decide such dispute shall, on petition of either group, be appointed by the district court of the United States for the district where the trust fund has its principal office, and shall also contain provisions for an annual audit of the trust fund, a statement of the results of which shall be available for inspection by interested persons at the principal office of the trust fund and at such other places as may be designated in such written agreement; and (C) such payments as are intended to be used for the purpose of providing pensions or annuities for employees are made to a separate trust which provides that the funds held therein cannot be used for any purpose other than paying such pensions or annuities; (6) with respect to money or other thing of value paid by an employer to a trust fund established by such representative for the purpose of pooled vacation, holiday, severance or similar benefits, or defraying costs of apprenticeship or other training programs: *Provided*, That the requirements of clause (B) of the proviso to clause (5) of this subsection shall apply to such trust funds; (7) with respect to money or other thing of value paid by any employer to a pooled or individual trust fund established by such representative for the purpose of (A) scholarships for the benefit of employees, their families, and dependents for study at educational institutions, or (B) child care centers for preschool and school age dependents of employees: *Provided*, That no labor organization or employer shall be required to bargain on the establishment of any such

trust fund, and refusal to do so shall not constitute an unfair labor practice: *Provided further*, That the requirements of clause (B) of the proviso to clause (5) of this subsection shall apply to such trust funds; (8) with respect to money or any other thing of value paid by any employer to a trust fund established by such representative for the purpose of defraying the costs of legal services for employees, their families, and dependents for counsel or plan of their choice: *Provided*, That the requirements of clause (B) of the proviso to clause (5) of this subsection shall apply to such trust funds: *Provided further*, That no such legal services shall be furnished: (A) to initiate any proceeding directed (i) against any such employer or its officers or agents except in workman's compensation cases, or (ii) against such labor organization, or its parent or subordinate bodies, or their officers or agents, or (iii) against any other employer or labor organization, or their officers or agents, in any matter arising under subchapter II of this chapter or this chapter; and (B) in any proceeding where a labor organization would be prohibited from defraying the costs of legal services by the provisions of the Labor-Management Reporting and Disclosure Act of 1959 [29 U.S.C. 401 et seq.]; or (9) with respect to money or other things of value paid by an employer to a plant, area or industrywide labor management committee established for one or more of the purposes set forth in section 5(b) of the Labor Management Cooperation Act of 1978.

(d) Penalty for violations

Any person who willfully violates any of the provisions of this section shall, upon conviction thereof, be guilty of a misdemeanor and be subject to a fine of not more than $10,000 or to imprisonment for not more than one year, or both.

(e) Jurisdiction of courts

The district courts of the United States and the United States courts of the Territories and possessions shall have jurisdiction, for cause shown, and subject to the provisions of section 381 of title 28 (relating to notice to opposite party, to restrain violations of this section, without regard to the provisions of section 17 of title 15 and section 52 of this title, and the provisions of chapter 6 of this title.

(f) Effective date of provisions

This section shall not apply to any contract in force on June 23, 1947, until the expiration of such contract, or until July 1, 1948, whichever first occurs.

(g) Contributions to trust funds

Compliance with the restrictions contained in subsection (c) (5) (B) of this section upon contributions to trust funds, otherwise lawful, shall not be applicable to contributions to such trust funds established by collective agreement prior to January 1, 1946, nor shall subsection (c) (5) (A) of this section be construed as prohibiting contributions to such trust funds if prior to January 1, 1947, such funds contained provisions for pooled vacation benefits.